Supreme Court, U.S.
FILED

99184 4 FEB 3 2000

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2000

FRANCIS X. LIVOTI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
To the
United States Court of Appeals for the Second Circuit

Submitted by:

PETER D. CODDINGTON, ESQ.

WORTH, LONGWORTH,
BAMUNDO & LONDON L.L.P.
111 John Street, Suite 640
New York, New York 10038

(212) 964-8036
Attorney for Petitioner

170PP

A. QUESTIONS PRESENTED

1. Under the United States Sentencing Guidelines, is error committed where the sentencing court gets confused and states that an upward departure from the **civil rights** guideline is being granted because of conduct outside the heartland of the civil rights guideline, but where, in reality, the offense level was predicated upon the civil rights guideline's cross-reference to the **involuntary manslaughter** guideline and where the conduct cited for the upward departure from the civil rights guideline is *within the heartland of the involuntary manslaughter guideline*?

2. In determining the defendant's offense level under the United States Sentencing Guidelines, if one of the *statutory* elements of the defendant's civil rights offense includes "color of law," isn't color of law automatically incorporated into the base offense level of the statute's corresponding sentencing guideline, thereby precluding the assessment of an additional 6-level specific offense characteristic enhancement for color of law, as was erroneously applied in this case?

3. Concerning an enhancement for obstruction of justice of an "instant offense" under the United States Sentencing Guidelines, is it error to assess the obstruction enhancement where the alleged obstruction occurred in a *state* trial, where the federal investigation was *not initiated until 15 months after the state court acquittal*, and where the state offense was for negligent homicide whereas the federal investigation related to civil rights violations?

4. Did the sentencing court not err in finding that Police Officer

Francis Livoti ("Livoti") caused the death of the subject, Anthony Baez ("Baez"), thereby resulting in the application of the involuntary manslaughter guideline, U.S.S.G. § 2A1.4(a)(2), rather than the civil rights guideline, U.S.S.G. § 2H1.1(a)(3), where Baez' death was caused in part by an acute attack of asthma and caused in part by Baez' and his brothers' intentional struggle with Livoti and other officers, after disobeying repeated orders from Livoti for Baez and his brothers to cease playing football in the street at 1:30 a.m.?

B. LIST OF PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties (petitioner Livoti and the United States).

C. TABLE OF CONTENTS

QUESTIONS PRESENTED ii

LIST OF PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

CITATION OF OPINIONS BELOW viii

BASIS OF JURISDICTION viii

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND GUIDELINES viii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 9

APPENDIX ..... Attached

A. Opinion of Court of Appeals

B. Judgment of Court of Appeals

C. Opinion of District Court

D. Judgment of District Court

E. Sentencing by District Court

F. Verdict of State Tribunal

TABLE OF AUTHORITIES

CASES

Koon v. United States, 518 U. S. 81, 116 S. Ct. 2035, 135 L. Ed. 392 (1996) 14, 16

United States v. Cassilliano, 137 F.3d 742, 746 (2d Cir. 1998) 23

United States v. George, 56 F.3d 1078 (9th Cir. 1995) . 17,18

United States v. Hayes, 135 F.3d 435 (6th Cir. 1998) 21

United States v. Hernandez-Fundora, 58 F.3d 1078 (9th Cir. 1995) 20, 21

United States v. Hudson 972 F.2d 540, 506-506 (2d Cir. 1992) 21

United States v. Johnson, 46 F.3d 636 (7th Cir 1995) 21

United States v. Langer, 958 F.2d 522 (2nd Cir. 1992) ... 12

United States v. Magluta, 1999 WL 1247767 (11th Cir. (Fla.) 1999) 14

United States v. McDermott, 918 F.2d 319 (2 Cir. 1990) . 12

United States v. Reese, 2 F.2d 870 (9th Cir. 1993) 17

United States v. Ruggiero, 100 F. 3d 284, 294 (2d Cir. 1996) 22

United States v. Perez, 50 F.3d 396 (7th Cir. 1995) 22

United States v. Sisti, 91 F.3d 305, 314 (2d Cir. 1996) . . 23

United States v. Werlinger, 894 F.2d 1015 (8th Cir. 1990) 21

STATUTES

18 U.S.C. § 112 16

18 U.S.C. § 242 . . . . . 4, 12, 19, 20, 21

UNITED STATES SENTENCING GUIDELINES

§ 2A1.4(a) 7, 15, 16, 17

§ 2H1.1 . . . . . 19, 20, 21, 24, 29

§ 3C1.1 . . . . . 21, 22

§ 5K2.0 6

§ 5K2.12 14

CITATION OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was filed on November 8, 1999. It was published in 196 F.3d 322, and is reprinted in this Petition as Appendix A. The opinion of the United States District Court for the Southern District of New York (Shira A. Scheindlin, J.) was filed on October 7, 1998, and was published in 22 F. Supp.2d 235 and is reprinted as Appendix C.

JURISDICTION

The date of the judgment sought to be reviewed was rendered by the United States Court of Appeals for the Second Circuit on November 8, 1999. This Petition is filed within 90 days of that date. The statutory provision which confers jurisdiction upon this Court is 28 U.S.C. § 1254(1).

LISTING OF STATUTES, RULES, AND GUIDELINES

18 USCA § 242. DEPRIVATION OF RIGHTS UNDER COLOR OF LAW

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are

prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

U.S.S.G. § 2A1.4. INVOLUNTARY MANSLAUGHTER

(a) Base Offense Level:

(1) 10, if the conduct was criminally negligent; or

(2) 14, if the conduct was reckless.

U.S.S.G. § 2H1.1. OFFENSES INVOLVING INDIVIDUAL RIGHTS

(a) Base Offense Level (Apply the Greatest):

(1) the offense level from the offense guideline applicable to any underlying offense;

(2) 12, if the offense involved two or more participants;

(3) 10, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or

(4) 6, otherwise.

(b) Specific Offense Characteristic

(1) If (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by 6 levels.

U.S.S.G. § 3C1.1. OBSTRUCTING OR IMPEDING THE ADMINISTRATION OF JUSTICE

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

U.S.S.G. § 5K2.0. GROUNDS FOR DEPARTURE (POLICY STATEMENT)

Under 18 U.S.C. S 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in

formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is inadequate or excessive.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, S5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental

function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under other guidelines. Therefore, if a weapon is a relevant factor to sentencing under one of these other guidelines, the court may depart for this reason.

Finally, an offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines.

U.S.S.G. § 5K2.12 COERCION AND DURESS (POLICY STATEMENT)

If the defendant committed the offense because of serious

coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. The Commission considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in sentence.

STATEMENT OF THE CASE

A. Facts of the Case.

The events of this case began in the early morning hours on December 22, 1994, when Livoti was driving a marked patrol car accompanied by fellow police officer, Sergeant William Monahan ("Monahan"). Officers Livoti and Monahan double parked the patrol car next to another police patrol car occupied by officers Fullam and Walcott on a street where four brothers, Baez, David Baez, Ramone Baez, Jr., and Henry Bothwell, were playing football in the middle of the street at one o'clock in the morning. (*Trial Transcript,* p. 720).

Shortly thereafter, Baez threw an errant pass which struck the trunk of one of the parked police cars. (*Trial Transcript*, p. 65). A few minutes later, the football again struck the police car being driven by Livoti. (*Trial Transcript*, p. 67). After the second football hit the police car, Livoti exited the car and instructed the brothers to quit playing football and to go home. (*Trial Transcript*, p. 69). However, the brothers **ignored** Livoti's directive and began to play again, this time playing away from the parked police cars. (*Trial Transcript*, p. 72). Shortly after the brothers resumed play, Livoti again exited his vehicle and ordered the brothers to go home and get out of the area. (*Trial Transcript,* p. 209). Despite this warning,

David Baez defied Livoti by proclaiming that he was going to sit on the jeep (Ramone Baez, Jr.'s jeep) and was not going home. (*Trial Transcript,* p.77, 211). When David Baez, in defiance of Livoti's order, sat down on the jeep, Livoti approached and arrested him. (*Trial Transcript*, pp.78-79).

As Livoti escorted David Baez to the police car, Baez and Henry Bothwell started walking toward the police car. (*Trial Transcript*, p. 215). Baez was extremely upset and protesting the arrest of his brother. (*Trial Transcript*, p. 150). Livoti then pushed Baez away from the police car toward the black jeep owned by Ramon Baez, Jr. and then attempted to rear-cuff Baez. (*Trial Transcript*, p. 218). However, Baez **resisted arrest** by holding his hands to his chest with his elbows pulled in against his body. (*Trial Transcript*, pp. 218-220). As Livoti was attempting to rear-cuff Baez, Henry Bothwell reached or **swung at Livoti.** (*Trial Transcript*, p.245, 850). Baez continued to struggle and resist being rear-cuffed by Livoti. The testimony is inconsistent as to whether Livoti applied a "choke-hold" to Baez's throat, but it is uncontested that eventually, Livoti and Baez plummeted to the ground, and with the assistance of several officers, Baez was rear-cuffed. (*Trial Transcript*, p. 739-741). The cuffing was accomplished, in part, by an officer placing his knee into Baez's back while Baez was laying face down on the ground. (*Trial Transcript*, p. 271).

Baez, who was 5'8" and weighed 269 pounds, suffered from chronic asthma, and at some point during the struggle suffered an **acute asthma attack.** (*Trial Transcript*, pp. 631-632). The acute asthma attack, combined with Baez's being on his stomach with Livoti's knee pressing on his back, reduced Baez's airflow capacity and his available oxygen.

The officers noted Baez's labored breathing and called for an ambulance; however, after several minutes, Monahan was informed that the ambulance had mistakenly proceeded to the police station. (*Trial Transcript*, p. 940). Baez was transported to the hospital by Officers Erotokritou and Boria, where life-saving measures were unsuccessfully administered. Baez was pronounced dead at Union Hospital. (*Trial Transcript*, p. 523).

B. The State Trial

Livoti was indicted by the State of New York for negligent homicide and was found not guilty in a judge tried case by Justice Gerald Sheindlin on October 7, 1996. (Appendix F).

C. The Federal Trial

After his state court acquittal, Livoti was indicted by the federal government on January 13, 1998, pursuant to 18 U.S.C. § 242 for violating the civil rights of Baez and was found guilty on June 26, 1998, following a two-week jury trial.

D. The Sentencing

At sentencing, Livoti was sentenced to 90 months, and the sentencing court made four erroneous sentencing determinations.

1. Erroneous Upward Departure. The sentencing court departed upward from the civil rights sentencing guideline. However, the offense level was determined from the involuntary manslaughter guideline, not the civil rights guideline.

2. Erroneous Specific Offense Characteristic Enhancement. The sentencing court enhanced Livoti's sentence by six levels based on a "color of law" enhancement under the civil rights guideline. However, color of law is a statutory element of the offense of which Livoti was convicted and cannot be double counted to increase his sentence.

3. Erroneous Obstruction Enhancement. The district court improperly assessed a 2-level obstruction of justice sentencing enhancement, even though the alleged obstruction did not occur in the "instant offense," but rather occurred in a separate state court trial for a different offense, 15 months prior to the initiation of the federal investigation.

4. Wrong Guideline. The sentencing court used the involuntary manslaughter guideline. However, because Livoti did not cause the death of Anthony Baez ("Baez"), the involuntary manslaughter guideline was inapplicable; instead, the civil rights guideline should have been used.

E. The Appeal

Livoti appealed the conviction to the United States Court of Appeals for the Second Circuit, which affirmed the conviction and sentence of the district court.

SUMMARY OF ARGUMENT

1. Erroneous 4-Level Upward Departure. The sentencing court was confused as to which of the guidelines from which the court departed upward. This confusion is critical. The court erroneously cited four factors as being atypical of the "civil rights guideline." (Sentencing Transcript, Appendix E, at 43). However, the court apparently forgot that the relevant guideline was the **involuntary manslaughter guideline**. The civil rights guideline was the initial guideline, but it contains a cross-reference to the guideline most applicable to the underlying conduct, which the court found to be the involuntary manslaughter guideline. In fact, the court used the involuntary manslaughter guideline to increase the base offense level from 10 to 14 by assessing a four-level enhancement for reckless conduct under the **involuntary manslaughter** guideline.

Accordingly, the issue is **not**, as erroneously stated by the sentencing court, whether the facts are atypical of the ordinary *civil rights* case, but rather, whether the facts are out of the heartland of the typical **involuntary manslaughter** case.

Upon examination, all of the bases for the trial court's 4-level "out-of-the-heartland" upward departure pursuant to U.S.S.G. § 5K2.0 are already in the heartland

of the involuntary manslaughter guideline and its 4-level specific offense characteristic enhancement for reckless conduct. U.S.S.G. § 2A1.4(a)(2).

2. Erroneous 6-Level Color of Law Enhancement. The structure of the Sentencing Guidelines is such that the elements of the statutory offense are already incorporated into the base offense level for that offense. For example, fraud has a base offense level of 6; theft has a base offense level of 4, etc. The punishment for the statutory element fraud is already built into the base level of 6 in the fraud guideline; similarly, the punishment for the offense of theft is already built into the base level of 4 in the theft guideline. Although these offense levels can increase based on specific offense characteristics, the specific offense characteristics cannot include conduct for the statutory elements of the offense, for which the base levels were established. For example, the fraud guideline may increase due to the amount of the dollar loss caused by the fraud; however, the fraud guideline may not increase by a finding of fraud, because fraud is a statutory offense element for which the base offense level of 6 has already been established.

Similarly, in Livoti's case, because color of law is a statutory offense level for which Livoti was convicted, and because that element is already built into the base offense level of the civil rights sentencing guideline, the

sentencing court cannot re-penalize Livoti for color of law under the 6-level specific offense characteristic for color of law.

3. Erroneous 2-Level Enhancement for Obstruction of Justice. The sentencing court's assessment of a 2-level enhancement for obstruction of justice was based upon the trial court's conclusion that (1) Livoti perjured himself in prior state proceedings, and (2) called witnesses that he knew would testify falsely. This conclusion is erroneous because the alleged perjury did not occur in the instant offense, and the mere act of presenting a defense and calling witnesses who fail to convince the jury should not form the basis of an obstruction enhancement.

As a matter of law an obstruction enhancement should not be assessed if the alleged obstruction occurs before the federal investigation is initiated and the federal investigation relates to a different offense from the state offense.

4. The Involuntary Manslaughter Guideline was Improper. Livoti did not cause Baez's death. Therefore, the cross-reference to the involuntary manslaughter guideline is an error. The only guideline used should have been the civil rights guideline.

Livoti submits that a police officer in the hostile

environment of New York City, at 1:00 o'clock in the morning, should not be found criminally responsible for causing the death of a 5'8", 269 lb. suspect who, together with his three brothers, is repeatedly ordered to stop playing football in the street, who repeatedly throws a football striking the police officers' car, who resists arrest, and who during the course of his intentional struggle is constrained around the neck by an officer out manned by 100 pounds, both of whom collapse on the ground, whereupon the suspect has an acute attack of his chronic asthma, suffocates, and expires.

ARGUMENT

A. The Erroneous Upward Departure

1. The Court Departed from the Wrong Guideline.

The district court granted a 4-level upward departure[1] based on its findings that several factors "made this case atypical" and took the case "outside the heartland of typical *civil rights* cases." (Sentencing Transcript, Appendix E, at 43). The court's statement regarding the typical *civil rights* case is an error. The issue is **not**

[1]The actual departure of 4-levels included the district court's consideration of the mitigating factors raised by Livoti. Thus, the upward departure, absent the mitigating factors, would have been greater than 4-levels.

whether the case is atypical for a civil rights case, but whether the case is atypical for a **reckless involuntary manslaughter**. The sentencing court sentenced Livoti based on the involuntary manslaughter guideline, pursuant to the cross-reference provision of the civil rights guideline which directs the court to use whichever guideline has the greatest offense level applicable to the underlying conduct. Since the sentencing court determined that Livoti caused Baez's death, the court used the involuntary manslaughter guideline to increase the base level and to assess a 4-level enhancement for reckless conduct in committing that involuntary manslaughter.

Thus, the issue is whether the factors cited by the sentencing court for the upward departure are factors atypical of a reckless involuntary manslaughter case.

The sentencing court cited four factors that it concluded made this case atypical from a civil rights case. The four factors are as follows: (1) there was a lack of probable cause for the arrests which triggered the incident; (2) Livoti acted without real provocation from Baez; (3) there were warnings given to Livoti not to engage in unnecessary confrontations with civilians, together with Livoti's awareness of a police training film regarding the dangers of a choke hold, and a departmental interim order forbidding the use of choke holds; and (4) the death of the victim. (Sentencing Transcript, Appendix E, at pp. 43-44,

47-48).

On the face of these reasons, and even assuming that every stated factor were correct, none of these factors pushes this case beyond the borders of the heartland of a typical **reckless involuntary manslaughter** case. Each of these factors is discussed below.

a. *Lack of Probable Cause.* The sentencing court first listed Livoti's lack of probable cause to arrest Baez as a factor warranting an upward departure. However, one must bear in mind that prior to assessing the 4-level upward departure, the court assessed a 4-level reckless conduct enhancement contained in the involuntary manslaughter guideline. That reckless conduct enhancement broadens the heartland of the involuntary manslaughter guideline to include the factors cited by the court as warranting the upward departure.

Accordingly, the issue is whether Livoti's lack of probable cause to arrest Baez is a factor that is within the heartland of a reckless involuntary manslaughter case, thereby precluding an upward departure. Livoti submits that lack of probable cause to arrest a subject, or the lack of a good reason to act in conformity with society's rules, is one of the factors which would make conduct reckless. Accordingly, whether it be lack of probable cause to arrest or lack of a good reason to act appropriately under the

circumstances, such conduct would be within the heartland of an involuntary manslaughter case caused by reckless conduct. As such, an upward departure based on that same conduct would not be appropriate.

Moreover, the lack of probable cause for an arrest has previously been held to be within the heartland of the *civil rights* guideline. 18 U.S.C. § 242 "previously has been applied to punish police officers who have abused their authority." *United States v. McDermott*, 918 F.2d 319 (2 Cir. 1990). In *McDermott,* two former transit police officers were convicted of conspiracy to violate constitutional rights, and for falsely arresting a non-citizen resident and depriving him of his constitutional rights. The Second Circuit affirmed the conviction of the officers and noted that "[d]ue process requires probable cause for an arrest, and when police officers acting in bad faith make an arrest without probable cause, the person arrested has suffered a deprivation of liberty without due process of law." *McDermott,* 918 F.2d 319, 325.

Also see *United States v. Langer,* 958 F.2d 522 (2 Cir. 1992), where a police officer was convicted of violating the civil rights of a female driver in violation of 18 U.S.C.§ 242, wherein the court determined that the defendant was "unlawfully stopping female drivers on a deserted stretch of highway, in the early morning, under color of law." Accordingly, lack of probable cause to

make an arrest is within the heartland of both the civil rights and involuntary manslaughter guidelines.

b. The Lack of Victim Provocation. The district court also cited the lack of victim provocation as a factor which made this case atypical, thereby warranting an upward departure. (Sentencing Transcript, Appendix E, p.43). Livoti suggests that this second factor of lack of victim provocation and the first factor of Livoti's lack of probable cause are practically indistinguishable. The lack of probable cause to make the arrest and the lack of provocation to engage in the struggle with Baez both boil down to the same overall conduct, i.e., no justification.

Alternatively, even if lack of provocation and lack of probable cause were distinguishable grounds for an upward departure, the lack of a victim's provocation would fall squarely within the heartland of a reckless involuntary manslaughter case. Otherwise, if there were victim provocation, the offense would not be reckless, and the defendant would be asserting justifiable homicide.[2]

---

[2] Moreover, the district court's conclusion that there was no provocation was contrary to the testimony by many of the government's own witnesses who testified that Baez was indeed resisting arrest which appears to contradict the district court's conclusion that there was a lack of provocation. Contradicting itself, while in one breath claiming that Livoti had no provocation, the district court admitted that Baez engaged in some conduct "that could reasonably be considered provocation" when he resisted having his hands cuffed behind his back. *Livoti*, 22 F. Supp.2d at

Interestingly, *victim* misconduct, i.e., provocation, is an encouraged ground for a *downward* departure. *Koon v. United States*, 518 U. S. 81, 105, 116 S. Ct. 2035, 135 L. Ed. 392 (1996). According to the district court's reasoning, *an upward departure would be warranted if there were no victim provocation, and a downward departure would be warranted if there were victim provocation* under U.S.S.G. § 5K2.12 and *Koon*. Clearly such a result is inconsistent with the goals of the Sentencing Commission, which emphasize that departures are to be reserved for "atypical" or "unusual" cases which are "highly infrequent." U.S.S.G. Intro. Ch. 1 Pt. A(4)(b).

Circuit courts have previously held that error occurs where the same conduct is counted to justify two separate upward departures. *United States v. Magluta*, 1999 WL 1247767 (11 Cir. (Fla.) 1999). Similarly, using the same conduct, but calling it different names, to support the same upward departure is another form of improper double counting. Lack of victim provocation and lack of probable cause both are different ways to say that Livoti acted recklessly, for which Livoti has already received a 4-level enhancement for reckless conduct.

Accordingly, that conduct is already within the heartland of the involuntary manslaughter guideline.

246

c. Livoti's Awareness Was Considered in Determining the Offense Level. The third factor relied upon by the district court as grounds for its 4-level upward departure is quoted below:

> "The third unusual circumstance in this case that warrants an upward departure is that Mr. Livoti had been personally and specifically warned not to engage in any unnecessary confrontations with civilians. This warning was given because of prior complaints. In addition, Mr. Livoti admitted that he was aware of a training film warning the police of the dangers of using a choke hold. He was also aware of an interim order forbidding the use of choke holds, and the then current Patrol Guide banning the use of choke holds." (Sentencing Transcript, Appendix E, at 44).

This same conduct, i.e., Livoti's awareness of the interim order and the training film is one of the reasons the sentencing court added four levels to Livoti's involuntary manslaughter guideline via the reckless conduct enhancement. The involuntary manslaughter guideline provides for a base offense level of 10 "if the conduct was

criminally **negligent**" or 14 "if the conduct was **reckless**." U.S.S.G. § 2A1.4(a) (1) and (2) (emphasis added). The Application Notes to the involuntary manslaughter guideline define "reckless" as:

> "Reckless" refers to a situation in which the *defendant was aware of the risk* created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation. *The term thus includes all, or nearly all, convictions for involuntary manslaughter* under 18 U.S.C. § 112. . ." U.S.S.G. § 2A1.4, Commentary, App. n.1. (Emphasis added).

The sentencing court acknowledged Livoti's awareness of the risks at hand when concluding that Livoti "was surely aware of the risk of using a choke hold and that disregarding that risk constituted a gross deviation from the standard of care that a reasonable person, indeed a reasonable police officer, would have exercised in this very non-threatening arrest situation" and that his conduct was "reckless." *Livoti*, 22 F.Supp.2d at 246. Specifically, the district court noted the following in assessing the 4-level enhancement for reckless conduct:

> "Livoti appreciated the risk created by the use of a choke hold because he was aware of the contents of the **training film** prepared by the Police Department, the October 20, 1993, **interim order**, and Patrol Guide Procedure 104-01, all of which prohibited the use of choke holds. In addition, this was not a situation that called for the extreme protective measures that might be required during the arrest of armed or violent criminals. *For these reasons, Livoti's conduct was reckless* and U.S.S.G. § 2A1.4(a)(2) applies, requiring a base offense level of 14." *Livoti,* 22 F.Supp.2d at 246. Emphasis added.

Accordingly, Livoti's awareness of the training film and the interim order are the gravamen of **both** the sentencing court's decisions to assess the 4-level upward departure and the 4-level enhancement for the reckless conduct enhancement under the involuntary manslaughter guideline.

The circuit courts have held that error "occurs where one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by the application of another part of the Guidelines." *United States v. Reese,* 2

F.3d 870 (9 Cir. 1993). Also see, *United States v. George,* 56 F.3d 1078 (9 Cir. 1995), where the Ninth Circuit found that the district court departed in error when one guideline section cross-referenced another guideline which included characteristics on which the district court departed upward.

Accordingly, since Livoti's awareness of the interim order and the training film was used to increase his sentence four levels under the involuntary manslaughter guideline, the heartland of that guideline was broadened, thereby bringing that conduct within its heartland, thereby precluding an upward departure based on that same conduct.

d. Death as Factor in Upward Departure. Finally, the district court erred in basing the upward departure, in part, on the death of the victim. The district court explained the decision to depart by 4-levels and stated the following:

> ". . . any lesser departure would be inadequate to permit the Court to impose a proper punishment. Unlike the situation in the *Koon* case, Mr. Livoti's violent and unprovoked behavior caused the death of an innocent man. While it may be true that he did not intend to kill Anthony Baez, and that Baez was an obese man suffering from both chronic asthma and an acute asthmatic

> attack during the incident, the fact is that Mr. Livoti's conduct did cause his death. Such a crime warrants a significant sentence. *Sentencing Transcript,* p.49.

The district court's statements clearly show that Baez's death was a factor upon which the court based its decision to depart. That was erroneous. Involuntary manslaughter, by definition, already includes death as a factor in the heartland of the guideline itself.

B. The Erroneous "Color of Law" Enhancement

The District Court erred in granting a six-level increase under U.S.S.G. § 2H1.1(b)(1) which provides for a six-level increase in the defendant's offense level if the defendant committed the offense under color of law or was a public official at the time of the offense. (Record, p.7). The base offense level as to a § 242 civil rights offense already includes color of law as an element of the offense, thereby precluding the re-use of color of law to assess a 6-level enhancement for the same conduct.

1. Color of Law Is an Element of the Offense

Livoti objected to the 6-level enhancement for color of law assessed under §2H1.1(b)(1)(A). The District Court overruled that objection and applied the 6-level color of

law enhancement for acting under the color of law. The basis for Livoti's objection was that the base offense level, *as to a § 242 civil rights offense*, already includes color of law.

The civil rights sentencing guideline, U.S.S.G. § 2H1.1, applies to numerous statutory offenses, not just Livoti's offense of conviction under 18 U.S.C. § 242. However, out of all the offenses sentenced under the civil rights guideline, 18 U.S.C. § 242 is the *only* statute that requires color of law as an *element of the offense*. The other offenses sentenced under § 2H1.1 do not require color of law; therefore, if color of law exists in those offenses, the defendant is punished "extra" by way of the 6-level color of law enhancement. Unlike those other statutes, a violation of Livoti's offense under 18 U.S.C. § 242 already includes color of law in the elements of the offense, punishment for which is already built into the base level of the civil rights sentencing guideline, and cannot be double counted by assessing a specific offense characteristic for the same conduct.

Under the structure of the Sentencing Guidelines, the "base level" of each sentencing guideline incorporates a punishment *for the elements of the offense*. Impermissible double counting occurs when the identical conduct is punished both in the base offense level and the specific offense characteristics of a particular guideline.

United States v. Hernandez-Fundora, 58 F.3d 802 (2d Cir. 1995); *United States v. Hudson* 972 F.2d 540, 506-506 (2d Cir. 1992); *United States v. Hayes*, 135 F.3d 435 (6th Cir. 1998); *United States v. Werlinger*, 894 F.2d 1015 (8th Cir. 1990); and *United States v. Johnson*, 46 F.3d 636 (7th Cir 1995).

Accordingly, since the base offense level is designed to include punishment for the elements of the offense, and since the elements of a § 242 offense already includes color of law, impermissible double counting would occur if an additional six levels were assessed under § 2H1.1's color of law enhancement. For the foregoing reasons, and to provide explicit guidance to the circuit courts on the issue of double counting in sentencing, certiorari should be granted.

C. The Erroneous Obstruction of Justice Enhancement

The sentencing court erred in assessing a 2-level enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1 because: (i) the alleged obstruction occurred in state court proceedings, and is not part of the instant offense; (ii) the alleged obstruction occurred prior to the time the federal investigation was initiated, and is not part of the instant offense; and (iii) the alleged obstruction occurred in relation to a negligent homicide charge, not in connection with the instant civil rights

offense.

U.S.S.G. § 3C1.1 provides that a sentencing court should increase the defendant's base offense level "if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution or sentencing of the instant offense." The court must find by *clear and convincing* evidence that an obstruction of justice occurred before applying the two-level enhancement for obstruction of justice. *United States v. Ruggiero*, 100 F. 3d 284, 294 (2d Cir. 1996).

Even assuming Livoti's testimony in the state grand jury was false, which Livoti denies, the District Court erroneously characterized this testimony as obstructing or impeding the "instant offense," when such a conclusion *swings too broadly* and *fails to give effect to the plain language of § 3C1.1* of the Guidelines. *U.S. v. Perez,* 50 F.3d 396 (7th Cir. 1995) (emphasis added). To reach the conclusion of the sentencing court that the alleged perjury should form the basis of a two-level enhancement, one must accept the proposition that the "instant offense" can relate to a different crime, with different elements, in a different forum, which was **not subject to federal investigation at the time of the alleged perjury**. Such a conclusion stretches the meaning of instant offense well beyond that which was intended by the Commission in

drafting the Guidelines.

In support of the district court's interpretation of "instant offense," the sentencing court cited *United States v. Cassilliano*, 137 F.3d 742, 746 (2d Cir. 1998), quoting *United States v. Sisti*, 91 F.3d 305, 314 (2d Cir. 1996), for the proposition that if the conduct can be "tied to" the offense of conviction, then the conduct falls within the "instant offense."[3] (Records Excerpts, p. 31). However, both *Cassilliano* and *Sisti* involved **ongoing investigations** of conspiracies in which the defendants obstructed justice by contacting co-conspirators in an effort to warn them of the **ongoing investigations**. Thus, these cases are distinguishable because in Livoti's case *the United States had not even begun its investigation* into the civil rights offense at the time of the state grand jury testimony (the alleged perjury). Furthermore, in *Sisti,* one of the defendants successfully challenged the obstruction enhancement on three of four counts because the conduct relied upon for the obstruction enhancement *occurred before the government had begun its investigation.*

Similarly, Livoti's alleged perjury occurred before the government had even begun its investigation of this case; occurred in a different forum; and occurred in an

---

[3]The Federal investigation of Livoti began 15 months after the conclusion of the state trial.

indictment for negligent homicide, rather than the instant offense of a civil rights violation.

For the foregoing reasons, Livoti's alleged obstruction cannot form the basis for an obstruction enhancement.

D. The Erroneous Involuntary Manslaughter Guideline

The District Court applied the involuntary manslaughter sentencing guideline because the civil rights guideline has a cross-reference provision which requires the court to apply the offense level from the guideline most applicable to the underlying conduct. Since the court found that Livoti caused Baez' death, albeit involuntarily, the court applied the involuntary manslaughter guideline, together with the 4-level reckless conduct enhancement, for a total offense level of 14; whereas, the appropriate guideline should have been the civil rights guideline, § 2H1.1(a)(3), with an offense level of 10, which is applied where the civil rights violation is accompanied by the use of force against a person.

In order to convict Livoti for a *civil rights* violation, there must only be proof that Livoti used unreasonable force to **injure** Baez; whereas, to use the *involuntary manslaughter* guideline, there must be proof that Livoti **killed** Baez. That proof was lacking at trial.

Indicative of the fact that Livoti did not cause Baez's death are the written findings by Justice Gerald Sheindlin, the judge in the prior state case, who, after weighing the credibility of the same witnesses in this case, concluded "[t]he defendant is found "**not guilty**" of negligent homicide." (Appendix C, Opinion of Justice Sheindlin). The following excerpts are quoted verbatim from Justice Sheindlin's reasons for verdict and adopted by Livoti as the reason why Livoti did not cause Baez's death, and concomitantly, why the involuntary manslaughter guideline should not have been applied.

1. Baez died as a result of multiple factors.

> "Anthony Baez was arrested by uniformed police officers and he engaged in a serious struggle to avoid being handcuffed. . . . During the struggle, Officer Livoti now joined by Sergeant Monahan and Mr. Baez, all fell to the ground with Mr. Baez face-down. The defendant along with other police officers applied significant pressure to Mr. Baez's back in an attempt to secure his hands behind him, thus completing the handcuffing. It is clear beyond a reasonable doubt that Anthony Baez died as a result of asphyxiation, complicated by chronic and acute asthma. That the pressure applied to his throat and the weight applied to his back in compressing his chest during the handcuffing caused an acute asthma attack." (Appendix C,

Opinion of Justice Sheindlin).

2. Baez's medical and physical condition contributed to his death.

> "It is equally clear that the medical evidence established that less pressure is necessary to asphyxiate a person such as Mr. Baez than a completely healthy individual because, one; he did suffer from chronic asthma, two; he was exerting himself in cold, dry air which could exacerbate his asthma, three; he was obese, four; he was engaged in a highly stressful and violent struggle which also served to exacerbate his asthma and lastly, he was face-down when the pressure was applied to his back." (Appendix C, Opinion of Justice Sheindlin).

3. Livoti released the choke hold, but the asphyxiation continued unbeknown to Livoti.

> "Dr. Hirsch further explained that the petechiae thus created would not disappear upon release of the choke hold, if a person thereafter [was] placed face-down on the ground and pressure applied to his back which prevents the chest from expanding. Dr. Hirsch noted that the person can asphyxiate

because he is unable to draw air into his lungs. . . That the deceased could regain consciousness after the grip was released; [Dr. Hirsch] was further of the opinion that the deceased was thereafter capable of resisting and struggling to avoid being handcuffed. That pressure applied to his back as he lay face-down on the ground could significantly impair his breathing which could further be impaired by an acute asthma attack. All of which circumstances could combine to cause Mr. Baez's asphyxiation and death." (Appendix C, Opinion of Justice Sheindlin).

4. Negligent homicide requires a perceived a risk of death or serious bodily injury.

". . .[t]hat the prosecution must prove that there existed a substantial and unjustifiable risk of death as a result of serious blameworthy conduct; *the nonperception of a risk, even if death results, is not enough to sustain a conviction* for criminally negligent homicide. (Appendix C, Opinion of Justice Sheindlin).

5. The situation developed too rapidly to attempt to reflect on what was occurring.

"In the instant case, the rapid, dynamic,

violent, emergency situation that unfolded when Officer Livoti attempted to place Anthony Baez under arrest, there was little time for reflection or consideration of whether his actions of putting his arm across Mr. Baez's chest and throat during a furious struggle, resulting in Mr. Baez being face-down on the ground and applying pressure to his back would cause him to cease breathing." (Appendix C, Opinion of Justice Sheindlin).

6. Baez engaged in a serious struggle with police.

"[Baez] became extremely agitated upon the arrest of his younger brother and he did engage in a serious struggle with a number of police officers to avoid being handcuffed upon his own arrest." (Appendix C, Opinion of Justice Sheindlin).

7. Livoti had no reason to know of Baez's asthmatic condition.

"Further, the surrounding circumstances do not suggest that Officer Livoti or any other officer should have suspected that Mr. Baez

> suffered from asthma, which would intensify the potential consequences of their actions. In fact the situation presented to the officers on the scene suggested otherwise. The deceased, Mr. Baez, was a strong young man who was 5 foot 8 inches, weighed 269 pounds, and had just been playing football." (Appendix C, Opinion of Justice Sheindlin).

Because Livoti did not kill Baez, the civil rights guideline, § 2H1.1(a)(3), should have been used in determining the base offense level. The involuntary manslaughter guideline was inapplicable because Livoti did not kill Baez.

CONCLUSION

For the foregoing reasons, Petitioner, FRANCIS X. LIVOTI, prays that his Petition for a writ of certiorari be granted, vacating the judgment below, and remanding to the United States District Court for resentencing.

Respectfully submitted,

PETER D. CODDINGTON
New York Bar No. 017249

WORTH, LONGWORTH,

BAMUNDO & LONDON
L.L.P.
111 John Street, Suite 640
New York, New York 10038
(212) 964-8036

CERTIFICATE

A copy of the above and foregoing was mailed, postage prepaid, in the United States mail to the Assistant United States Attorney who is listed as counsel of record in this case. This _____ day of February, 2000.

PETER D. CODDINGTON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1999

(Argued: September 17, 1999)
Decided: November 8, 1999

Docket No. 98-1608

United States of America,
Appellee

-v.-

Francis X. Livoti,
Defendant - Appellant

Before: OAKES, MCLAUGHLIN, SACK, Circuit Judges.

Francis X. Livoti

Francis X. Livoti appeals from a judgment of the United States District Court for the Southern District of New York (Scheindlin, J.) convicting him on one count of violating the civil rights of Anthony Baez. He challenges both his conviction and his sentence.

Affirmed.

BACKGROUND

McLAUGHLIN, Circuit Judge:
The events underlying this appeal are set forth at length in the district court's several thorough opinions. See United States v. Livoti, 8 F.Supp.2d 246 (S.D.N.Y.1998) (Livoti I); United States v. Livoti, 8 F.Supp.2d 250 (S.D.N.Y.1998) (Livoti II); United States v. Livoti, 22 F.Supp.2d 235 (S.D.N.Y.1998) (Livoti III); United States v. Livoti, 25 F.Supp.2d 390 (S.D.N.Y.1998) (Livoti IV). We summarize them here only as necessary to this appeal.

At around 1:30 a.m. on December 22, 1994, then-officer Francis Livoti, of the New York City Police Department ("NYPD"), and three other officers parked their two patrol cars on a street near the South Bronx home of Anthony Baez. Baez and his three brothers were playing football in the street. After two errant passes struck the patrol cars, Livoti yelled and cursed at the brothers, ordering them to go home. After some discussion among themselves, the Baez brothers decided to continue their game, playing in the opposite direction. Before they could continue, however, Livoti again got out of the patrol car, cursing at the brothers and challenging them

to a fight. The situation escalated when Baez's brother David openly defied Livoti's orders to leave. Livoti announced that David would be spending Christmas at Rikers Island, cuffed him, and put him in the back of a patrol car.

Livoti then turned to Anthony Baez, who had been protesting his brother's arrest. Livoti pushed Baez across the street and attempted to cuff his hands behind his back. Baez resisted Livoti's efforts to handcuff him behind his back, holding his hands to his chest. Baez's father (who had come out of the house) and brothers then saw Livoti put Baez in a choke hold, hooking the crook of his arm around Baez's neck and pulling Baez upward and backward. Baez's father shouted at Livoti, pleading with him to stop choking his son. After some time, Livoti lowered the by-then limp Baez to the ground and cuffed his hands behind his back. Meanwhile, four additional officers had arrived on the scene in two more patrol cars. Baez remained motionless on the ground until police officers carried him to a patrol car and drove him to a nearby hospital. He was pronounced dead shortly thereafter. Livoti was indicted in the United States District Court for the Southern District of New York for violating Baez's civil rights in violation of Baez's right to be free from excessive force. The government introduced: (1) eye-witness testimony of the Baez family describing the confrontation including Livoti's use of a choke hold; (2) medical testimony that Baez died primarily

as a result of a choke hold that lasted one minute and rendered Baez unconscious; and (3) proof that Livoti was well aware at the time of the incident that NYPD regulations prohibited choke holds, and that, because of prior complaints of excessive force, Livoti's superiors had specifically warned him to avoid unnecessary confrontations with civilians.

In his defense, Livoti denied that he had used a choke hold, asserting that any choking was unintentional and that he had not caused Baez's injuries or death. He presented testimony of three officers who had been at the scene on December 22, 1994. They contradicted the Baez family, testifying that they did not see anyone put Baez in a choke hold, that Baez was resisting arrest when Livoti handcuffed him, and that Baez was conscious after being handcuffed. In rebuttal, the government called two additional officers who had been present at the confrontation. They testified that Baez was not moving or resisting arrest after he was handcuffed. The jury convicted Livoti.

At sentencing, the district court made five adjustments, enhancements, and departures--all over Livoti's objection. First, finding that Livoti had recklessly caused Baez's death, the court determined Livoti's base offense level by using the involuntary manslaughter guideline, see U.S.S.G. §§ 2A1.4(a)(2), as applied through the civil rights

guideline's cross-reference provision, see U.S.S.G. §§ 2H1.1(a)(1). Second, the court applied the civil rights guideline's six-level enhancement for violations committed by public officials or those acting "under color of law," see §§ 2H1.1(b)(1). Third, the court imposed a two-level obstruction of justice enhancement, see U.S.S.G. §§ 3C1.1, because it found, inter alia, that Livoti had called police officers as witnesses in his trial, knowing that they would commit perjury. Fourth, the district court granted the government's motion for a "horizontal" upward departure of one point in Livoti's criminal history category ("CHC") because it found that Livoti's CHC did not adequately reflect the seriousness of his past criminal conduct. Finally, the district court granted the government's request for a "vertical" upward departure in Livoti's offense level pursuant to U.S.S.G. §§ 5K2.0. The court found that aggravating factors took Livoti's offense outside the heartland of civil rights cases and upwardly departed four levels.

The final result of this calculus was an offense level of 26 and a CHC of III, yielding a sentencing range of 78 to 97 months. Judge Scheindlin sentenced Livoti to 90 months.

Livoti now appeals his conviction and sentence.

DISCUSSION

During oral argument, Livoti's central point was that the district court abused its discretion by granting the vertical upward departure of four steps in his offense level. Before considering that challenge, however, we briefly address Livoti's other arguments raised in his brief against his conviction and sentence.

I

Livoti argues that: (A) the district court should have granted him a change of venue because of negative pretrial publicity; (B) the district court committed various evidentiary errors that warrant reversal; (C) the evidence was insufficient to support his conviction; and (D) the district court committed a number of other sentencing errors.

A. Change of Venue

We reject Livoti's argument that the district court was required to grant him a change of venue pursuant to Fed.R.Crim.P. 21(a) because of negative pretrial publicity. We will not reverse the district court's decision absent an abuse of discretion. See United States v. Maldonado-Rivera, 922 F.2d 934, 966-67 (2d Cir.1990). Although Livoti complains of the "overwhelming and ever-escalating negative publicity" surrounding his case, he provided no specific examples of such publicity when he moved for a change of venue.

Because we agree with the district court that Livoti failed

to show a "reasonable likelihood" that pretrial publicity would prevent a fair trial, we find no abuse of discretion. Id. at 966-67 (quoting Sheppard v. Maxwell, 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)).

B. Evidentiary Rulings

Nor do we find any abuse of discretion in the various evidentiary rulings challenged by Livoti. See United States v. Arena, 180 F.3d 380, 400 (2d Cir.1999). Livoti argues that the district court improperly: (1) admitted "similar act" evidence that Livoti had choked another arrestee, Steven Resto, in the past; (2) restricted Livoti's cross-examination of Resto; and (3) elicited prejudicial testimony from a government rebuttal witness.

Judge Scheindlin's decision to admit proof of Livoti's assault on Resto was not an abuse of discretion. Evidence of prior criminal conduct is admissible under Federal Rules of Evidence 404(b) and 403 if it is relevant to an issue at trial other than the defendant's character, and if its probative value is not substantially outweighed by the risk of unfair prejudice. See United States v. Pitre, 960 F.2d 1112, 1120 (2d Cir.1992). The testimony that Livoti choked Resto did not violate Rule 404(b) or 403 because it was relevant to rebut Livoti's assertion that he choked Baez unintentionally. Furthermore, the evidence did not involve conduct more inflammatory than the charged

crime, and the district court gave a careful limiting instruction. See id.

Nor did the district court unduly restrict the cross-examination of Resto. Livoti was permitted to elicit that Resto once had been a defense alibi witness in an unrelated homicide case and that the case resulted in a conviction; however, the district court precluded inquiry into the details of the case. Because this limitation in no way hampered the jury's ability to make a "discriminating appraisal" of Resto's credibility, it was not an abuse of discretion. United States v. Rosa, 11 F.3d 315, 336 (2d Cir.1993).

Finally, we need not address Livoti's argument that the district court improperly elicited prejudicial testimony from a government rebuttal witness. Because Livoti made no timely objection to the district court's questions, and because we find no plain error, see Fed.R.Crim.P. 52(b), we decline to review this claim.

C. Sufficiency of the Evidence

Similarly, we reject Livoti's argument that the evidence was insufficient to establish his guilt and that the district court should have granted his motion for judgment of acquittal. We must uphold the conviction if, viewing the evidence in the light most favorable to the government, a

reasonable jury could find the elements of the crime beyond a reasonable doubt. See United States v. Morrison, 153 F.3d 34, 49 (2d Cir.1998).[5] For the jury to convict Livoti of violating Baez's right to be free from excessive force, it had to find that he: (1) acted under color of law; (2) used unreasonable force; (3) acted willfully; and (4) caused bodily injury to Baez. See 18 U.S.C. §§ 242; United States v. Schatzle, 901 F.2d 252, 257 (2d Cir.1990); 1 L. Sand, et al., Modern Federal Jury Instructions, ¶¶ 17.01 at 17-4 (1997).

The government presented more than sufficient evidence to establish these elements beyond a reasonable doubt. That evidence included, inter alia: (1) the Baez family's eye-witness testimony that Livoti put Baez in a choke hold; (2) medical testimony that the choke hold lasted for one minute and rendered Baez unconscious; and (3) proof that the NYPD prohibited choke holds under any circumstances.

D. Sentencing Rulings

Finally, we reject the battery of miscellaneous challenges to Livoti's sentence. Livoti argues that the district court committed sentencing errors when it: (1) applied the involuntary manslaughter guideline, see U.S.S.G. §§ 2A1.4(a)(2), to determine Livoti's base offense level; (2) imposed the two- level obstruction of justice enhancement pursuant to U.S.S.G. §§3C1.1; (3) imposed the six-level

enhancement under U.S.S.G. §§ 2H1.1(b)(1) for civil rights violations committed by public officials or defendants acting "under color of law;" (4) granted a "horizontal" upward departure of one criminal history point in his CHC under U.S.S.G. §§4A1.3. Reviewing the district court's application of the sentencing guidelines de novo, and its underlying factual findings for clear error, see United States v. Martinez-Santos, 184 F.3d 196, 198 (2d Cir.1999), we find no reason to disturb Livoti's sentence.

We reject Livoti's argument that the district court erred when it applied the involuntary manslaughter guideline. While Livoti challenges the district court's express finding that he "caused" Baez's death, that finding is not clearly erroneous. It rested largely on credibility determinations which we are in no position to evaluate. See United States v. Langford, 990 F.2d 65, 70 (2d Cir.1993).

We also find that the district court correctly applied a two-level enhancement for obstruction of justice. The court based this enhancement, in part, on its finding that Livoti had called fellow officers as trial witnesses knowing that they would lie. This finding, which also rested largely on credibility determinations, is not clearly erroneous and provides ample justification for the two-level enhancement. See United States v. Noland, 960 F.2d 1384 (8th Cir.1992) ("[S]olicitation of false testimony generally may be viewed

as an obstruction of justice."); cf. United States v. Kirsh, 54 F.3d 1062, 1073-74 (2d Cir.1995) (causing false affidavit to be filed warranted obstruction enhancement).

We also reject Livoti's contention that the district court improperly imposed the civil rights guideline's six-level enhancement for defendants who were public officials or acted "under color of law" at the time of the offense, see U.S.S.G. §§ 2H1.1(b)(1). Livoti argues that application of this enhancement constituted improper "double counting"--that is, considering the same conduct twice--because the statute under which he was convicted already requires proof that he acted under color of law. See 18 U.S.C. §§ 242. We need not consider this issue, however, because, as the district court pointed out, the six-level enhancement was alternatively justified on the wholly independent ground that Livoti was a "public official" at the time of the offense. See Livoti III, 22 F.Supp.2d at 246 n. 10. Livoti does not challenge the finding that he was a public official.

Finally, we reject Livoti's contention that the district court should not have ratcheted up his criminal history category pursuant to U.S.S.G. §§ 4A1.3. Such departures are appropriate "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct." U.S.S.G. §§ 4A1.3. Judge Scheindlin found that a CHC departure was warranted because in addition to Livoti's

assaults on Baez and Steven Resto, he had on another occasion assaulted two arrestees without provocation. Specifically, Livoti had assaulted Manuel Bordoy, breaking his jaw in three places, and Ivan Cruz, slapping him 10 to 15 times. Because these unprosecuted assaults were not reflected in Livoti's CHC, and were remarkably similar to Livoti's other violent crimes, we find that the district court's upward departure of one criminal history point was not an abuse of discretion. See United States v. Delmarle, 99 F.3d 80, 83 (2d Cir.1996).

II

We now turn to Livoti's central argument on appeal: that the district court abused its discretion when it granted a vertical four-point upward departure pursuant to U.S.S.G. §§5K2.0 in Livoti's offense level on the basis of aggravating circumstances. Livoti contends that his offense conduct, even if considered "extreme," does not fall outside the "heartland" of the civil rights guideline, see U.S.S.G. §§2H1.1. He argues that §§2H1.1 adequately considers his extreme conduct because it incorporates the guideline applicable to the underlying offense, namely, the involuntary manslaughter guideline, see U.S.S.G. §§ 2A1.4, and because the manslaughter guideline, in turn, provides for a base offense level which applies specifically to "reckless" conduct, see U.S.S.G. § 2A1.4(a)(2). We disagree. A court must ordinarily sentence a defendant within the range prescribed by the applicable guidelines. See United

States v. Payton, 159 F.3d 49, 60 (2d Cir.1998). However, a sentencing court may depart from the applicable guideline range if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. §§ 3553(b). The guidelines, in turn, explain that each guideline applies to a "heartland," that is, "a set of typical cases embodying the conduct that each guideline describes." U.S.S.G. Ch. 1, Part A, 4(b). Thus, "[w]hen a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." Id.

"A district court's decision to depart from the guidelines ... will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." Koon v. United States, 518 U.S. 81, 98, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996). Because district courts see so many more guidelines cases than do appellate courts, they have an "institutional advantage" in determining whether a given case is atypical. See id. at 98, 116 S.Ct. 2035 ("In 1994, for example, 93.9% of Guidelines cases were not appealed.") Accordingly, we review only for abuse of discretion a district court's

decision to depart on the ground that a case does not lie within the "heartland" of a guideline. See id. at 96-100, 116 S.Ct. 2035. Applying this standard here, we find no basis to disturb Livoti's sentence.

The district court found that Livoti's conduct fell outside the "heartland" of typical civil rights cases for essentially two reasons. First, it found that Livoti had himself created the violent situation which led to Baez's death because the Baez brothers had done nothing wrong and Livoti lacked probable cause to arrest them. Second, the district court found that Livoti had been aware of NYPD regulations prohibiting choke holds under any circumstances and that he had been specifically warned by his superiors to avoid excessive force and unnecessary confrontations with civilians. We consider each factor in turn.

Considering the first factor, we find that the district court was within its discretion when it considered the fact that Livoti needlessly instigated the confrontation with the Baez brothers. Livoti argues that the involuntary manslaughter guideline adequately takes this sort of conduct into consideration because that guideline applies to "gross deviation[s] from the standard of care that a reasonable person would exercise in such a situation." See U.S.S.G. §§ 2A1.4 application notes 1 & 2 (defining the standard of care for both reckless and criminally negligent involuntary

manslaughter). We disagree. While the standard of care described in §§2A1.4 adequately considers the fact that Livoti put Baez in a choke hold when a reasonable person would not have done so under the circumstances, it does not take into consideration the aggravating circumstance that it was Livoti's wholly gratuitous aggression which created the confrontation in the first place.

Livoti also contends that the district court failed to consider that Baez at least contributed to the confrontation by resisting Livoti's efforts to handcuff him behind his back. However, the district court did indeed consider Baez's resistance but found that Livoti remained responsible for the incident because he had no reason to arrest Baez in the first place. In light of the sentencing court's special competence to make these sorts of refined factual assessments, we decline to second-guess this determination. See Koon, 518 U.S. at 98, 116 S.Ct. 2035; United States v. Galante, 111 F.3d 1029, 1035 (2d Cir.1997). We also find that the district court had the discretion to consider that Livoti had disregarded NYPD prohibitions on choke holds and ignored specific warnings to avoid use of excessive force in his encounters with civilians. Livoti argues that this consideration was already factored into the equation when the district court applied the involuntary manslaughter guideline applicable to "reckless" conduct, that is, conduct engaged in by a defendant who was

"aware" of the risk created by his conduct. However, the district court made perfectly clear that it was departing not just because Livoti was "aware" of the risk created by his conduct, but rather because he deliberately disregarded NYPD safety regulations and repeated warnings by his superiors to refrain from using excessive force. In other words, Livoti not only disregarded a known risk, he also flouted direct orders and department policy.

Moreover, even if the district court considered the warnings and department policy only insofar as they made Livoti "aware" of the risks of using excessive force, we would not find an abuse of discretion. We have held that "a sentencing court may depart 'even though the reason for the departure is taken into consideration in the guidelines ... if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.' " United States v. Ventura, 146 F.3d 91, 97 (2d Cir.1998) (quoting U.S.S.G. §§ 5K2.0). Because of the unusual circumstances of this case, it lay within the district court's discretion to find that the guideline did not "adequately" take into consideration the degree to which Livoti was made aware of the dangers of using excessive force. Livoti was certainly aware of NYPD prohibitions on choke holds and had viewed a training film describing the dangers of choke holds. More importantly, however, because of numerous prior complaints about his use of

excessive force, Livoti had been singled out for placement in a special monitoring program in which he was repeatedly counseled about unnecessary civilian confrontations and the dangers of using excessive force. These factors clearly establish Livoti's heightened awareness of the risks associated with excessive force.

Livoti's fallback contention is that the district court failed to articulate the reasons "why it could not have assessed 1-level, or 2 or 3- levels, for an upward departure." However, we have clearly held that a sentencing court need not undertake such a "mechanical level-by-level review of the extent of the upward departure." United States v. Campbell, 967 F.2d 20, 26 (2d Cir.1992) (quoting United States v. Rodriguez, 968 F.2d 130, 140 (2d Cir.1992)). Instead, all that is required is that the district court give a "careful explanation in the record of the reasons for the extent of the departure." Id. Judge Scheindlin took pains to "explain why [she] departed by 4 levels, rather than more or less." She stated that while certain mitigating factors persuaded her not to depart any higher than four levels, an upward departure of any less would not permit proper punishment for Livoti's "violent and unprovoked behavior" which "caused the death of an innocent man." Under these circumstances, we find that the district court adequately explained itself and that the extent of departure was reasonable.

CONCLUSION

We have considered Livoti's remaining contentions and find them to be without merit. Accordingly, Livoti's conviction and sentence are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 8th day of November, one thousand nine hundred and ninety-nine.

BEFORE: Hon. James L. Oakes
Hon. Joseph M. McLaughlin
Hon. Robert D. Sack

Circuit Judges

Docket No. 98-1608

UNITED STATES OF AMERICA,

Appellee

-v-

FRANCIS X. LIVOTI,

Defendant-Appellant

Appeal from the United States District Court for the

Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

FOR THE COURT
Karen Greve Milton,

Acting Clerk

By:

Beth J. Meador
Administrative

Attorney

UNITED STATES of America

v.

Francis X. LIVOTI, Defendant.

No. 98 CR. 25 (SAS).

United States District Court,

S.D. New York.

Oct. 7, 1998.

Defendant was convicted of violating civil rights of arrestee. Defendant filed objections to presentencing report (PSR), as well as motion for downward departure in sentencing. Government filed sentencing memorandum and motion for upward departure in sentencing. The District Court, Scheindlin, J., held that: (1) arrestee died primarily as result of asphyxiation resulting from defendant's application of choke hold; (2) defendant acted with high degree of risk that his conduct would result in death or serious bodily injury, characteristic of involuntary manslaughter; (3) defendant's conduct was reckless; (4) specific offense characteristic enhancement for offenses by public officials or under color of law was applicable; and

(5) defendant committed perjury within scope of perjury enhancement by testifying falsely before state grand jury investigating arrestee's death and offering fellow officers' testimony known by him to be perjurious.
Ordered accordingly.

OPINION

SCHEINDLIN, District Judge.

On June 26, 1998, following a two-week jury trial, Defendant Francis X. Livoti was convicted of violating the civil rights of Anthony Baez, in violation of 18 U.S.C. § 242. In anticipation of his upcoming sentence, a Presentence Report ("PSR") has been prepared. The defendant has objected to various portions of the PSR. The defendant has also submitted a motion for a downward departure. The Government, in turn, has submitted a Sentencing Memorandum, defending the PSR and moving for an upward departure. The defendant has submitted a response to the Government's Sentencing Memorandum.

There are three major disputes, all of which involve issues of law. The first dispute is over the appropriate base offense level required by United States Sentencing Guidelines ("U.S.S.G.") § 2H1.1(a)(1). The second concerns the applicability of the specific offense characteristic found at U.S.S.G. § 2H1.1(b). Finally, the parties disagree as to whether an enhancement for obstruction of justice, pursuant to U.S.S.G. § 3C1.1, is

warranted.

Because all of these disputes raise complicated issues of fact and law, I believe it is necessary to decide them in a written opinion so that the parties have a full and reasoned *239 explanation of my decisions. In order to understand the discussion of the legal issues it is necessary to briefly summarize two portions of the testimony: (1) the description of the actual confrontation between the defendant and the victim; and (2) the medical testimony regarding the cause of death.

I. Factual Background

A. Overview

At trial, four members of the Baez family testified that they saw Livoti restrain Anthony Baez in a choke hold on the morning of December 22, 1994. Trial Transcript ("Tr.") at 93-96, 102-04, 105, 223-25, 327-28, 412-13. According to the testimony of family members and police officers, Anthony Baez was then lowered to the ground, where he remained motionless until he was carried by four police officers to a patrol car and taken to Union Hospital. Tr. at 111-14, 116-19, 230-32, 234, 334-35, 338-39, 414-16, 472-74, 478, 480, 915-17, 1290-95, 1320-22, 1326-29. After arriving at the hospital, Anthony Baez's father told Dr. Kim Jaggers, an emergency room physician, that his son had been choked. Tr. at 418, 482-83, 526. Dr.

Charles Hirsch, the Chief Medical Examiner of the City of New York, testified that the cause of Anthony Baez's death was asphyxiation due to neck and chest compression, Tr. at 637, and that, in his opinion, the neck compression was caused by a choke hold which lasted for at least one minute. Tr. at 627-28, 640-42.

B. Detailed Account of the Confrontation Revealing Lack of Provocation

The following account of the incident summarizes the credible evidence with respect to the events of December 22, 1994. [FN1] Henry Bothwell, one of the Baez brothers, testified that he, Anthony Baez, David Baez and Ramon Baez, Jr. were playing football outside their home when a police car pulled up and parked in the street. See Testimony of Henry Bothwell ("Bothwell Tr.") at 184. Between five and ten minutes later, another police car arrived. See id. at 186. This car came straight up to Ramon and David's location and almost hit David, causing him to "jump back." See id. at 187-88; Testimony of David Baez ("D. Baez Tr.") at 306. David walked toward the passenger side of the car and asked the driver, Francis Livoti, why he was trying to hit them. See Bothwell Tr. at 244; D. Baez Tr. at 307. This car then backed away and double-parked next to the other police car. See Bothwell Tr. at 188.

FN1. As noted, infra, the testimony offered by Livoti was directly

contradictory to critical portions of this testimony.

Some time later, Anthony threw the football toward Henry, but it went over his head and hit the trunk of one of the police cars. See id. at 190. A few minutes later, the ball hit the police cars again. See id. at 192.

After the football hit the police car, Livoti came out of the second car and started yelling and cursing at the Baez brothers to "get the hell out of here." See id. at 192-94; D. Baez Tr. at 311-12. He appeared angry and said "I want you the fuck out of here, I want you to go to your fucking home, I want you to go to a fucking park." See Bothwell Tr. at 193; D. Baez Tr. at 312-13. Either Anthony or Henry told Livoti that "this is where we live." See Bothwell Tr. at 193. According to Henry, nobody touched Livoti, nobody made any threatening gestures toward him and none of the brothers had any weapons. See id. at 194-95.

After this incident, the four brothers backed away and huddled, deciding whether or not to continue with the game. See id. at 195. They decided to keep playing, but agreed that they would play the game in only one direction, rotating sides after each touchdown, so that they would not throw the ball in the direction of the police cars. See id. at 195-96.

Shortly thereafter, Anthony threw the ball to Henry.

See id. at 208. Livoti came out of the car. See id. He appeared angry and he came toward them, swearing. See id. at 208-09; D. Baez Tr. at 313-14. He said "didn't I tell you fucking guys to get out of the area? I want you to go the fuck home." See id. at 209. He went up to Raymond, saying "who's *240 the ringleader, who's going to fight me now." See id. at 209; D. Baez Tr. at 314.

Raymond started backing away from Livoti, raising his hands in the air with his palms facing Livoti. See Bothwell Tr. at 210. Henry and Anthony were in front of Livoti, and they stood where they were. See id. David walked around them, sat on the front bumper of Ramon Baez Jr.'s jeep, which was parked on the street, and said he was going to sit on the jeep and was not going home. See id. at 211; D. Baez Tr. at 314. As soon as David sat down, Livoti went over to him and said that he was going to spend his Christmas in Rikers. See Bothwell Tr. at 212; D. Baez Tr. at 314. He then turned him around, faced him down on the hood of the jeep and handcuffed him. See Bothwell Tr. at 212; D. Baez Tr. at 315-316. David did not resist or struggle with Livoti as he was being cuffed. See Bothwell Tr. at 214; D. Baez Tr. at 316. Livoti then took David over to the police car, pulling on his cuffs. See Bothwell Tr. at 213; D. Baez Tr. at 316-19.

At this point, Henry and Anthony started walking toward the police car, with Raymond behind them. See Bothwell Tr. at 215. By the time they got to the jeep,

Livoti was walking back toward them. See id. Livoti approached Anthony, the most vocal in protesting David's arrest, who was saying, "I know my rights, I know what you are doing is wrong, I'm a security officer in Orlando." See id. at 215-16; D. Baez Tr. at 319-22. Livoti told Anthony to "shut the hell up or [you're] going to go in too." See Bothwell Tr. at 216. Livoti then pushed Anthony to the back of the jeep. See id. According to Henry, Anthony did not push Livoti or move his hands toward him in any way. See id.

Livoti then attempted to put Anthony's hands behind his back. See id. at 218-20. Anthony held his hands to his chest, with his elbows pulled in against his body, and Henry saw Livoti grab his by the arm and try to pull it towards his back. See id. Anthony resisted having his arms pulled back, struggling not to get cuffed. See id. at 220, 247, 288. Another officer then joined Livoti.

Henry pleaded with the officers to let Anthony go, telling them that his brother had asthma. See id. at 221-22. Henry reached toward Anthony and tried to grab him, but the other officer turned around and faced Henry. See id. Henry backed away, and he saw Anthony leaning forward. See id.

Henry then saw Livoti go and grab Anthony around the neck and pull him back up. See id. at 222-23, 260-61. Livoti's back was toward the jeep, his right arm, including

the crook of the arm, was around Anthony's neck and the other arm was on his back. See id.; D. Baez Tr. at 324, 381-82, 377; Testimony of Raymond Baez, Sr. ("R. Baez Tr.") at 413. Livoti had one leg underneath Anthony, and to David, it appeared that Livoti was trying to flip him down to the ground. See D. Baez Tr. at 324-25.

While Livoti had his arm around Anthony's neck, Henry started backing up toward the house, calling for his father. See Bothwell Tr. at 224-25. He turned around toward the house and was tackled by one of the officers and handcuffed. See id. at 225-27. David had exited from the police car and was running toward the house, past where Anthony and Livoti were standing. See D. Baez Tr. at 327-29. A police officer jumped on David's back and threw him to the ground. See id. at 332. Another officer put a gun to his head. See Bothwell Tr. at 228; D. Baez Tr. at 332.

The officer who tackled Henry picked him up and put him in the first police car. See Bothwell Tr. at 229. As they were walking to the car, Henry looked toward the back of the jeep and saw Anthony laying motionless on the ground with his eyes closed. See id. at 229-231; D. Baez Tr. at 334-35. Livoti was on top of him, with his knee on Anthony's back, handcuffing him, and two or three other officers were standing around. See Bothwell Tr. at 230; D. Baez Tr. at 335-38; R. Baez Tr. at 414-15.

By the time Anthony arrived at the hospital at 2:05 a.m., he had no blood pressure, no pulse rate, and no respiratory rate. See Tr. at 503 (testimony of emergency room physician Dr. Kim Jaggers).

C. The Cause of Death

The Government called Dr. Charles Hirsch, New York City's Chief Medical Examiner, *241 to testify regarding the cause of death. Dr. Hirsch based his conclusion on autopsy findings, including an examination of the autopsy reports, photographs and microscopic examination of certain tissue samples, as well as eyewitness descriptions of the events. Based on this evidence Dr. Hirsch concluded that Baez died due to asphyxiation, which means lack of air. Tr. at 628; 637.

When asked his opinion as to the cause of death, Dr. Hirsch responded:

It is my opinion that the primary cause of death of Mr. Anthony Baez was asphyxia, due to compression of his neck and chest. It is also my opinion that acute and chronic asthma were contributory, lesser factors in his death. Id. at 637. He further testified that "Mr. Baez's injuries resulted from a choke hold." Id. at 640.

[T]here was a compressive squeezing force exerted on his neck from side to side. The most reasonable

explanation for this is a form of choke hold in which the assailant's elbow, the bend of the elbow is in the front of the neck, and the bicep and forearm close in a vice-like manner to squeeze and compress the neck from side to side.
Id. at 640-41. Dr. Hirsch described this type of choke hold as a "carotid sleeper choke hold" designed to "compress the carotid arteries which provide the main source of blood to the brain." Id. at 641.

It is at this point that the evidence becomes somewhat confusing. Dr. Hirsch concludes that while the physical evidence, such as internal bruising of the muscles, reveals that a carotid sleeper choke hold was applied, it was not successful because the carotid arteries were not compressed. Id. at 642.
Dr. Hirsch knew this because blood continued to be pumped into Baez's face. Id. However, because the veins in Baez's neck were compressed by the choke hold, the blood was unable to drain out, causing the shower of petechiae or tiny hemorrhages found in Baez's face and neck. Id.

Dr. Hirsch further testified that it would take approximately one minute of compression of the neck or chest to produce the petechiae found in Baez's body. Id. at 646. He concluded that Baez would have been rendered unconscious at the end of that period. Tr. at 649. Dr. Hirsch then testified as follows:

The mechanism of unconsciousness in Mr. Baez's case in my opinion resulted from two factors. One is the impairment of return of venous blood from his face and brain. The second is the compression of his airway, of his upper air passages, and a backward and upward displacement of the base of his tongue. That covers the top of the larynx or obstructs the top of the larynx in a fashion such that you can't breathe.... Id.

Thus, according to Dr. Hirsch, the defendant's application of a choke hold, which was evidenced by petechial hemorrhaging in Baez's face and neck as well as bilateral internal bruising, compressed Baez's upper air passages and displaced his tongue so that it blocked his airway.

Livoti called Dr. Cyril Wecht, the Director of Forensic Pathology at St. Francis Central Hospital in Pittsburgh, Pennsylvania. Dr. Wecht gave the following testimony with respect to the cause of death.

This gentleman had an acute and chronic bronchial asthma....So you put all of that together, and this would be a situation in which I would understand quite easily as a forensic pathologist that the death was attributable to cardiac arrhythmia, abnormal beating of the heart precipitated by bronchial asthmatic attack that led to diminished oxygenation that produces hypoxia, insult to the heart, causing it to beat erratically....The cause of death

in this particular case, such as we have just discussed ... would be cardiac arrhythmia, due to hypoxia due to acute and chronic asthma.

Tr. at 1043-46. Dr. Wecht reached this conclusion, in part, because he found no evidence that Baez had been the victim of a choke hold. He noted that there was no damage to the structure of the neck, and no scratches on the neck indicating that Baez might have tried to free his neck from a choke hold. Tr. at 1028, 1031. In addition, he offered an *242 explanation for the bilateral bruising on the inside surfaces of the neck. With respect to the large area on the left side, he testified that:

[Y]ou have these movements, and you have the arms moving and maybe flailing, and an arm coming up and striking with some force in this area, sternocleidomastoid, breast bone, clavicle, you know, you can do this.

Tr. at 1035. Regarding the smaller area on the right side, he testified that:

[Y]ou could get that hemorrhage in that area from the pressure applied in the application of the Ambu-bag pressing up and trying to get it positioned.... Tr. at 1038-39.

Finally, Dr. Wecht gave the following explanation for the petechial hemorrhages:

The petechial hemorrhages, in my opinion, in this case were caused principally by the state of hypoxia the decreased oxygen, the cardiac arrhythmia then which sent into motion leading to an even greater diminution or compromise of oxygenation, coupled with the chest compressions that took place for 45-50 minutes at the hospital, coupled with whatever kind of compression may have taken during the struggle between Mr. Livoti and the other police officers and Mr. Baez. Tr. at 1099.

During cross-examination, however, Dr. Wecht agreed that chest and/or neck compression helped to trigger Mr. Baez's attack of bronchial asthma. Tr. at 1093-94. He further agreed that the petechial hemorrhages could have been caused by compression of the neck. Tr. at 1101. He explained that neck compression could have occurred because: "there was some limited, quite fleeting, compression in the grasping and grabbing. I think that that's part of anybody's story...." Tr. at 1093.

While the issue is not free of doubt, I find that the fair preponderance of the credible evidence, favors the conclusions of Dr. Hirsch. I conclude that the defendant's use of a choke hold caused Baez's asphyxiation by restricting his breathing. While the victim's acute and chronic asthma, as well as his obesity, made it even more difficult for him to breathe, the choke hold was the immediate cause of Baez's death due to asphyxiation. Dr. Wecht's medical conclusions were informed, in part, by his

acceptance of the police version of the events rather than those reported by the Baez family. On the other hand, both this Court and the jury have accepted the version reported by the Baez family. It is clear to me that if Dr. Wecht accepted that version of the events, he would essentially reach the same conclusion as Dr. Hirsch-- namely that Baez died of asphyxiation due to the neck compression caused by the choke hold. Nothing in his testimony is inconsistent with that hypothesis.

II. Discussion

A. The Appropriate Base Offense Level

The parties agree that the appropriate guideline for the offense of conviction, 18 U.S.C. § 242 ("deprivation of rights under color of law"), is found by applying U.S.S.G. § 2H1.1(a), which requires the Court to use the greatest of four choices, the first of which is the offense level from the offense guideline applicable to any underlying offense. The Probation Department and the Government argue that the appropriate underlying offense is voluntary manslaughter, which carries a base offense level of 25. The defendant argues that the third choice should apply, which describes the use of force against a person and carries a base offense level of 10. I disagree with both.

Before the appropriate underlying offense can be determined, the court must decide whether Livoti killed

Baez. Because in a civil rights case, the fact that the victim died is not an element of the crime, the jury in this case did not have to reach this issue. The determination of what killed Baez must now be decided by this Court.

Under the Sentencing Guidelines, a court need only resolve disputed facts relevant to the sentencing by a preponderance of the evidence. See United States v. Concepcion, 983 F.2d 369, 388 (2d Cir.1992); United States v. Guerra, 888 F.2d 247, 251 (2d Cir.1989). If the Court were to find that Livoti was not responsible for Baez's death, as Livoti *243 argues, then the Court would be required to apply the offense level set forth in U.S.S.G. § 2H1.1(a)(3), describing an offense involving the use or threat of force against a person and setting a base offense level of 10. As discussed in some detail in the previous section, however, I find that the choke hold applied by Livoti caused the asphyxiation which killed Baez.

1. The Relevant Classifications

The next question, then, is whether Livoti committed murder, voluntary manslaughter, or involuntary manslaughter, either in a reckless or criminally negligent manner. The distinction between these terms is not easy to describe or comprehend. The most difficult element, of course, is the required state of mind, or intent. A brief discussion of each term is necessary:

a. Murder. To prove a murder in the second degree, the Government must establish each of the following elements: (1) that the defendant killed the victim; (2) that the defendant acted unlawfully; and (3) that the defendant acted with malice aforethought. [FN2] See 2 Leonard B. Sand et al., Modern Federal Jury Instructions P 41.01, at 41-5 (1995) ("Sand P __, at __"). Here, the proof at trial established that Livoti killed Baez and that he acted unlawfully in applying a choke hold, which had been banned by the Police Department, thereby constituting an illegal assault. The remaining element, malice aforethought, requires further definition.

FN2. First degree murder would also require that the defendant acted with premeditation. Because there is no proof of premeditation in this case, I will not discuss first degree murder or this particular element.

Malice is the state of mind that would cause a person to act without regard to the life of another. To satisfy this element, the defendant must have acted consciously, with the intent to kill another person. However, the government need not prove a subjective intent to kill on the part of the defendant. It would be sufficient to satisfy this element if it proved reckless and wanton conduct on the part of the defendant which grossly deviated from a reasonable standard of care such that he was aware of the serious risk of death. In order to establish this element, the government must prove that the defendant acted willfully, with a bad or evil purpose to break the law.

Sand P 41.01, at 41-13 (emphasis added). Common law malice includes three distinct mental states, any one of which is sufficient to prove murder: (1) intent to kill; (2) intent to do serious bodily harm; and (3) a "depraved heart." 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law S 7.1(a), at 183 (1986) ("LaFave & Scott S __, at __"). A depraved heart represents a level of extreme recklessness and wanton disregard for human life. See United States v. Browner, 889 F.2d 549, 553 (5th Cir.1989).

b. Voluntary Manslaughter. To prove voluntary manslaughter, the Government must establish each of the following elements: (1) that the defendant killed the victim; (2) that the defendant acted unlawfully; and (3) that the defendant did so in a sudden quarrel or the heat of passion. See Sand P 41.02, at 41-39. Here, once again, the proof at trial establishes that Livoti killed Baez and that he acted unlawfully in applying the choke hold. The remaining element, "heat of passion," requires further definition.

The basic inquiry is whether or not at the time of the killing, the reason and judgment of the defendant was obscured or disturbed by passion ... to such an extent as would cause an ordinarily reasonable person of average disposition to act rashly and without deliberation and from passion rather than judgment. Before you may find that the defendant acted in the heat of passion, you must also find

that there was adequate provocation. Here, too, the provocation or acts arousing such passion must be such as to create the same degree of passion in a reasonable man and cause him to lose self-control. The question is, was the provocation so slight to arouse passion, or was it sufficient to cause an ordinary man, a reasonable man, an average man, to become aroused? Would the ordinarily reasonable man, placed in the same position in which the defendant found himself, and knowing what the defendant then knew or believed he knew, have been thrown into such heat of passion?

Sand P 41.02, at 41-46, 47 (emphasis added); see also United States v. Scafe, 822 F.2d 928, 932 (10th Cir.1987) (malice is negated by the fact that intentional killing occurred in the heat of passion in response to a sufficient provocation).

c. Involuntary Manslaughter. To prove involuntary manslaughter, the Government must establish each of the following elements: (1) that the defendant killed the victim; (2) that the defendant acted unlawfully; and (3) that the defendant acted with gross negligence and had either actual knowledge or reason to know that his conduct was a threat to the lives of others. See Sand P 41.02, at 41-50. Here, once again, the proof at trial establishes that Livoti killed Baez and that he acted unlawfully in applying the choke hold. The remaining element, including the concepts of "gross negligence" and "actual knowledge,"

requires further definition.

Gross negligence means conduct amounting to wanton or reckless disregard for human life. If ... the defendant had neither actual knowledge nor reason to know that his conduct was a threat to the lives of others or if ... he did not act with gross negligence ... then [he is] not guilty. Sand P 41.02, at 41-57. See also Browner, 889 F.2d at 553 (rather than the malice required for murder, the requisite mental state is reduced to "gross" or "criminal" negligence, which is something less than the most extreme recklessness and wantonness required for "depraved heart" malice); LaFave & Scott SS 7.1, 7.12(a), at 183, 278.

2. Classifying Livoti's Conduct

I first conclude that Livoti's conduct cannot be classified as voluntary manslaughter. Thus, his conduct either was sufficiently reckless and wanton to meet the alternative standard for malice required to prove second-degree murder; or his conduct was grossly negligent such that he committed involuntary manslaughter. I reach this conclusion for the simple reason that crediting the version of the events proffered by the Government and summarized at Section I.B, above, there was no adequate provocation by the victim from which to find that Livoti acted in the heat of passion. [FN3] No reasonable person, indeed no reasonable police officer, would have lost self-control and been murderously aroused by a kid refusing to go home or

by his brother telling the officer that there were no grounds for his arrest. The only conduct by Anthony Baez that could reasonably be considered provocation was his resistance to having his hands put behind his back to be cuffed. The credible testimony reveals, however, that Anthony's hands were on his chest, with his elbows pulled in; he was not striking at or fighting with Livoti. See Bothwell Tr. at 218-220. This level of resistance is inadequate to send a reasonable police officer into a passion of rage in which he loses his self-control. [FN4]

FN3. The Government argues that Livoti's conduct qualifies as voluntary manslaughter because it occurred in the course of a "sudden quarrel." Although the phrase "sudden quarrel" is not well defined in the federal case law, the cases that do address the phrase suggest that it is not distinct from the element of "heat of passion," and that "sudden quarrel" is but one type of provocation. See United States v. McRae, 593 F.2d 700, 705 (5th Cir.1979) ("it is surely not the quarrel that signifies but the heat of passion that it occasions"); United States v. Martinez, 988 F.2d 685, 696 (7th Cir.1993) ("it may be arguable that the 'sudden quarrel' term is an anachronism with no meaning not adequately served by a proper definition of heat of passion"). Indeed, Judge Sand points out that no reported cases have required a charge for "sudden quarrel" separate from "heat of passion." Sand P 41.02, at 41-48. Moreover, even if the term "sudden quarrel" has a separate meaning apart from "heat of passion," it is applicable where the parties "willingly engage in mutual combat, and during the fight one kills the other as the result of an intention to do so formed during the struggle." LaFave & Scott § 7.10, at 257; see also Martinez, 988 F.2d. at 696 ("sudden quarrel" charge not applicable where defendant did not willingly engage in mutual combat but entered the ongoing encounter to aid one of the combatants). Because Anthony Baez did not

willingly engage in combat with Livoti--indeed he did not engage in any combat with Livoti--Livoti's conduct cannot be characterized as voluntary manslaughter based on a sudden quarrel.

FN4. "What is really meant by 'reasonable provocation' is provocation which causes a reasonable man to lose his normal self-control; and, although a reasonable man who has thus lost control over himself would not kill, yet his homicidal reaction to the provocation is at least understandable. Therefore, one who reacts to the provocation by killing his provoker should not be guilty of murder. But neither should he be guilty of no crime at all. So his conduct falls into the intermediate category of voluntary manslaughter." LaFave & Scott § 7.10(b), at 256.

Indeed, the Government, itself, tried this case on the theory that none of the Baez brothers did anything to provoke the attack. In these circumstances, Livoti's offense cannot be shoehorned into the limited category of voluntary manslaughter, which requires that the defendant acted in the heat of passion. [FN5]

FN5. The states of mind required for voluntary manslaughter--intent to kill, intent to do serious bodily harm or depraved heart--are the same as those required for murder, except that in voluntary manslaughter, malice is negated due to the element of "heat of passion." Browner, 889 F.2d. at 553. As an alternative ground, and as discussed more fully, infra, because Livoti did not intend to kill or cause serious bodily harm and he did not evince a "depraved heart," his conduct does not rise to the level of voluntary manslaughter.

The next question, then, is to distinguish the degree of intent that separates murder from involuntary

manslaughter. This distinction turns on the degree of risk created by the defendant's intentional conduct. Thus, according to LaFave & Scott, murder requires a "very high degree" of risk that death or serious bodily injury will result from the defendant's conduct; while manslaughter requires a "high degree of risk" (which is more than an unreasonable risk). See LaFave & Scott § 7.4, 7.12(a), at 199-200, 278. Under either murder or involuntary manslaughter, if the defendant who creates a risk realizes that he does so, his conduct is reckless. See id., at 200, 278. Thus, involuntary manslaughter, which does not rise to the level of negligence or recklessness required for murder, "differs from murder only in that it requires a reduced level of culpability in committing the same physical act." Browner, 889 F.2d. at 553.

Upon reviewing all of the evidence, I conclude that Livoti acted with a high degree of risk that his conduct would result in death or seriously bodily injury, but did not act with a very high degree of risk or with such recklessness and wantonness as to rise to the level of a finding of murder. I rely on the following to reach this conclusion: (1) the training film used by the Police Department warns that choke holds are prohibited because they may cause death by asphyxiation, although such deaths occur very rarely in the course of an arrest; [FN6] thus, the film would not lead a reasonable officer to conclude that a choke hold would inevitably cause death, although it would lead an officer to conclude that such

conduct would present a serious risk of death; (2) Livoti was also aware of an Interim Order of the Police Department, dated October 20, 1993, and Patrol Guide Procedure 104-01, both forbidding the use of choke holds; [FN7] (3) it is highly likely from all the material that I have considered that Livoti had previously used a carotid sleeper choke hold and believed that it would render a victim unconscious rather than cause him serious bodily injury; and (4) Dr. Hirsch, himself, appeared to conclude that it was somewhat unexpected for a carotid sleeper choke hold to cause death by asphyxiation, suggesting that this was a result that was possible, but not likely to occur. For these reasons, Livoti's conduct fits the definition of involuntary manslaughter better than that of second degree murder. [FN8]

FN6. The training film, which was received in evidence as Government's Exhibit 13, was played to the jury at trial. See Tr. at 615-16. The first portion of the fifteen minute film discusses the risk of causing death by asphyxiation while restraining a suspect. Though it focuses on the danger of placing weight on a suspect's back while he is lying face-down, the film indicates that asphyxiation may also be caused by "hog tying" a suspect or by applying a choke hold. With respect to choke holds, the film displays a large "no sign" (a circle with a slash through it) overlaid on a photograph of a man applying a carotid sleeper choke hold. In the second portion of the film, which primarily discusses the use of O.C. spray, the narrator states that "[m]embers of the service are reminded of current department regulations that forbid choke holds, hog tying a suspect or lying, kneeling, sitting, or standing on a subject's back while trying to restrain them," while the prohibition is displayed on the screen in capital

letters.

FN7. See Tr. at 609-11.

FN8. Interestingly, neither the Probation Department nor the Government suggested that the Court apply the Second Degree Murder Guideline found at U.S.S.G. § 2A1.1 and requiring a base offense level of 33. Livoti argues that he was not responsible for Anthony Baez's death. Alternatively, he argues that if the Courts does find that he caused the death, the proper base offense level is involuntary manslaughter.

The final question, then, is whether Livoti's conduct was reckless such that the base offense level for involuntary manslaughter should be 14 rather than 10. See U.S.S.G. § 2A1.4(a)(1) and (2). Application Note 1 to this Section, contains the following definition and guidance: "Reckless" refers to a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation. The term thus includes all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. § 1112. [FN9]

FN9. 18 U.S.C. § 1112 defines involuntary manslaughter as the unlawful killing of a human being "[i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death."

I find that Livoti was surely aware of the risks of using a choke hold and that disregarding that risk constituted a gross deviation from the standard of care that a reasonable person, indeed a reasonable police officer, would have exercised in this very non-threatening arrest situation. As already noted, Livoti appreciated the risk created by use of a choke hold because he was aware of the contents of the training film prepared by the Police Department, the October 20, 1993, Interim Order, and Patrol Guide Procedure 104-01, all of which prohibited the use of choke holds. In addition, this was not a situation that called for the use of extreme protective measures that might be required during the arrest of armed or violent criminals. For these reasons, Livoti's conduct was reckless and U.S.S.G. § 2A1.4(2) applies, requiring a base offense level of 14.

B. The Public Official Enhancement

U.S.S.G. § 2H1.1(b)(1) provides a specific offense characteristic enhancement. This section states that "[i]f (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by 6 levels." The Probation Department and the Government concluded that this enhancement is warranted. Livoti, however, argues that this enhancement is not permitted because 18 U.S.C. § 242, the offense of conviction, requires a finding that the defendant acted under color of law. This section states, in pertinent part,

"[w]hoever, under color of law ... willfully subjects any person ... to the deprivation of any rights ... shall be guilty of a crime." 18 U.S.C. § 242. He argues that to allow the enhancement would result in impermissible double-counting, that is considering the same conduct twice.

Livoti's argument must be rejected. In this Circuit, impermissible double counting occurs where a court considers the same factor both in setting the base offense level and in applying a special offense characteristic that enhances that level or in granting a departure from that level. See, e.g., United States v. Hudson, 972 F.2d 504, 506-07 (2d Cir.1992); United States v. Campbell, 967 F.2d 20, 23 (2d Cir.1992); United States v. Coe, 891 F.2d 405 (2d Cir.1989). Section 2H1.1 applies to all civil rights violations, whether or not they are committed by public officials or under color of law. For example, S 2H1.1 provides the applicable guidelines for violations of 18 U.S.C. § 242, 245(b), 246, 247, 248 and 1091 as well as 42 U.S.C. § 3631, none of which requires that the defendant have committed a civil rights crime in his official capacity or under color of law. Thus, the "under color of law" element is not a component of the base offense level under § 2H1.1. As a result, application of the six-level enhancement under S 2H1.1 does not constitute impermissible double counting. [FN10] *247 Because Livoti acted under color of law and as a public official, a six-level enhancement is warranted pursuant to U.S.S.G.

§ 2H1.1(b).

FN10. Even if the concept of double counting were expanded to prohibit a court deciding on a sentencing enhancement from considering factors that were elements of the offense of conviction, Livoti's argument would fail. The enhancement at issue here is required in either of two alternative circumstances: (1) if a defendant acted "under color of law," or (2) if he was "a public official" at the time of the offense. In United States v. Price, 383 U.S. 787, 794, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), the Supreme Court held that one need not be a public official to act under color of law. Thus, the enhancement would be warranted because being a public official, which Livoti was, is not an element of the offense for which he was convicted.

C. Obstruction of Justice

Both the Probation Department and the Government believe that a two-level increase for Livoti's obstruction of justice is warranted. U.S.S.G. § 3C1.1 provides that a sentencing court should increase a defendant's offense level "[if] the defendant wilfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution or sentencing of the instant offense" (emphasis added). Application Note 3 provides a non-exhaustive list of examples of the types of conduct to which the obstruction of justice enhancement applies which includes "committing, suborning, or attempting to suborn perjury."

Before the perjury enhancement is applied, a court must "find that the defendant 1) willfully 2) and materially 3) committed perjury, which is (a) the intentional (b) giving of false testimony c) as to a material matter." United States v. Zagari, 111 F.3d 307, 329 (2d Cir.1997). The enhancement is mandatory once its factual predicates have been established. United States v. Friedman, 998 F.2d 53, 58 (2d Cir.1993) (citing United States v. Dunnigan, 507 U.S. 87, 98, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993)). Obstruction of justice must be found by clear and convincing evidence. United States v. Ruggiero, 100 F.3d 284, 294 (2d Cir.1996). Finally, Application Note 1 to § 3C1.1 requires that conflicts as to sworn testimony claimed to be perjurious and about which the judge has no firm conviction must be evaluated in the light most favorable to the defendant.

The Government argues that the obstruction of justice enhancement is warranted because Livoti lied during his state grand jury testimony and because he offered perjured testimony in his defense. I will address both of these contentions.

1. Perjury Before the State Grand Jury

Livoti argues that even if he testified falsely before a state grand jury, which he denies, that testimony cannot be a basis for an enhancement of his federal sentence because the state was not investigating or prosecuting the

"instant offense," as required by the plain language of U.S.S.G. § 3C1.1. For the reasons set forth below, Livoti's argument is rejected.

First, I find by clear and convincing evidence that in light of the jury's verdict and my review of the trial record and Livoti's state grand jury testimony, Livoti committed perjury by testifying falsely on many material matters. [FN11] The real question, then, is whether his testimony before the state grand jury obstructed justice "during the investigation, prosecution, or sentencing of the instant offense."

FN11. Listing each and every perjurious statement in Livoti's grand jury testimony would be an impossible task. In summary, his version of the events surrounding the Baez incident is simply not credible in light of all the testimony adduced at the federal trial. However, some specific examples are noted to provide the flavor of that testimony: On March 9, 1995 and November 16, 1995, Livoti testified that Anthony Baez shoved him after arguing with him. Livoti's Grand Jury Testimony of March 9, 1995 ("KV") at 18; Livoti's Grand Jury Testimony of November 16, 1995 ("MT") at 17. He also testified that Henry Bothwell swung at him, KV at 19; MT at 20, and that Anthony Baez shoved him against the jeep. KV at 21-22; MT at 24. Livoti further testified that while Anthony Baez was on the ground, Baez shoved him in the face, with his open right hand and struggled with the officers who were attempting to handcuff him. KV at 23-24; MT at 66, 78. Livoti also testified that during the struggle, a young black civilian offered his assistance. KV at 24; MT at 29. Finally, Livoti testified that after being on the ground, Anthony Baez got up with the assistance of Livoti and Police Officer Robert Ball, and walked a short distance in a fatigued fashion. KV at 26; MT at 39, 67-69.

The focus of this inquiry is to identify the "instant offense." While the elements of the state charges and the federal charge are obviously different, the offense in both cases involved Livoti's attack on Anthony Baez during the course of an arrest. Thus, while the instant offense is a different crime than that prosecuted in the state case, it involved the same conduct. Livoti testified before the state grand jury in January and March of 1995. I accept, for these purposes, Livoti's contention that no federal investigation was underway at that time. Nonetheless, the false testimony related to the events surrounding the death of Anthony Baez. Thus, broadly read, perjury occurred during the investigation and prosecution of the instant offense. In addition, Livoti's false testimony was partially responsible for triggering the federal investigation, resulting in an enormous expenditure of time and money.

The best discussion of this issue is found in United States v. Self, 132 F.3d 1039 (4th Cir.1997). In that case, a defendant was convicted on federal firearms charges (being a felon in possession of a firearm). The underlying conduct involved a robbery and assault by the defendant and his accomplice on two elderly sisters. When arrested, the defendant was found to be in possession of a gun which had been used to pistol whip one of the sisters. While the defendant was in the custody of the local police, he solicited a fellow inmate to murder the sisters in return for a $5,000 payment.

In discussing whether the obstruction of justice enhancement could apply to these facts, the court assumed, arguendo, that there was no federal investigation pending at the time of the solicitation. Nonetheless, the court held that the enhancement applied.

Section 3C1.1 draws no distinction between a federal investigation and a state investigation. It merely requires that the conduct occur during the investigation of the "instant offense." U.S.S.G. § 3C1.1. The failure of the guideline to distinguish between an investigation by federal officials as opposed to state officials undoubtedly is founded in a recognition that state officers are authorized to and frequently do investigate criminal conduct that ultimately is prosecuted under federal law. Indeed, in the initial stages of a criminal investigation, it may be anything but clear whether the conduct being investigated violates state law, federal law, or both. Accordingly, the appropriate focus of inquiry is not whether federal officials had begun involvement with the investigation, but whether the investigation was for "the instant offense." Id. at 1042-43. The court held "that the term 'instant offense' in § 3C1.1 refers to the offense of conviction including relevant conduct." Id. at 1044. Because the murderous solicitation occurred during the investigation of the robbery and assault, which were found to be relevant to the offense of conviction, the enhancement for obstruction of justice was upheld. Id.

The Second Circuit has similarly defined "instant offense." In United States v. Perdomo, 927 F.2d 111, 118 (2d Cir.1991), the court held that the term "instant offense" as used in § 3C1.1 means the offense of conviction. Accordingly, the "reference to conduct 'during' the investigation, prosecution, or sentencing of the instant offense means that the enhancement may not properly be imposed for obstructive conduct that preceded the commission of the offense of which the defendant was convicted." United States v. Fernandez, 127 F.3d 277, 283 (2d Cir.1997) (citing Perdomo). Rather, the obstruction must be " 'tied to a count of conviction.' " United States v. Cassiliano, 137 F.3d 742, 746 (2d Cir.1998) (quoting United States v. Sisti, 91 F.3d 305, 314 (2d Cir.1996)).

Here, Livoti's perjured testimony before the state grand jury, relating to the circumstances surrounding Anthony Baez's death, was surely "tied to" the offense of conviction. Accordingly, this conduct obstructed and impeded the federal investigation. Therefore, an obstruction of justice enhancement in the federal civil rights charge is warranted based on Livoti's perjured testimony before the state grand jury. See also United States v. Smart, 41 F.3d 263 (6th Cir.1994) (approving obstruction of justice enhancement where defendant gave false name to local police, and then fled the jurisdiction, prior to commencement of federal investigation for drug trafficking); United States v. Emery, 991 F.2d 907 (1st

Cir.1993) (approving obstruction of justice enhancement where defendant escaped from state authorities prior to initiation of federal investigation); United States v. Lato, 934 F.2d 1080 (9th Cir.1991) (after his arrest by state authorities, defendant denied using false names and mailed letters instructing a witness to lie; because the federal offense of mail fraud involved the same conduct as that for which defendant was arrested by state authorities, enhancement applies); but see United States v. Perez, 50 F.3d 3 (7th Cir.1995) (although recognizing that obstructive conduct during a prior state investigation may warrant enhancement for a related federal offense, enhancement denied where defendant's flight from the country during state investigation did not obstruct or impede the federal investigation). [FN12]

FN12. In addition to United States v. Perez, supra, Livoti also cites United States v. Gacnik, 50 F.3d 848 (10th Cir.1995). However, this case is distinguishable. In Gacnik, the court held that at the time of the obstructive conduct (hiding explosives), the defendant was unaware of any investigation of the offense of conviction.

2. Offering Perjurious Testimony

The Government also seeks the obstruction of justice enhancement based on the fact that Livoti offered the testimony of several police witnesses who testified falsely at the federal trial. The question remains, however, as to whether this conduct, if true, amounts to an

obstruction of justice.

There is no doubt that Livoti knew what the police testimony would be because the same witnesses testified at the state trial. I further conclude that because he knew that these witnesses would testify in a manner consistent with his own version of the events, he knowingly offered false testimony.

There is clear and convincing evidence that the police witnesses called by Livoti testified falsely. They each testified that Anthony Baez was conscious, moving and resisting their efforts to handcuff him, at a time that he was, in fact, unconscious as a result of the choke hold applied by Livoti. See Testimony of Sergeant William Monahan ("Monahan Tr.") at 889-93; Testimony of Anthony Farnan ("Farnan Tr.") at 992; Testimony of Mario Erotokritou ("Erotokritou Tr.") at 1254, 1257-59. Police officers also falsely testified that after he was handcuffed, Baez, with assistance from Livoti, got to his feet and took a few steps. See Monahan Tr. at 908-11; Erotokritou Tr. at 1204-11. The application of the choke hold, and the fact that it rendered Baez unconscious, were amply proven by the medical testimony, the testimony of the Government's civilian witnesses, and the rebuttal evidence provided by two police officers. See generally, Testimony of Dr. Hirsch, the Baez brothers and Yvette Rodas, and Officers Robert Ball and Daisy Boria. See also Government's Sentencing Memorandum at pp. 16-20.

Most disturbing, however, was the incredible testimony of two defense witnesses that an unidentified black or Hispanic civilian, unobserved by anyone else at the scene, momentarily joined in a struggle to subdue Anthony Baez on the ground. See Monohan Tr. at 898- 900; Farnan Tr. at 975-76. This does not mean, however, that Livoti suborned perjury. "'Subornation of perjury consists in procuring or instigating another to commit the crime of perjury.' " Petite v. United States of America, 262 F.2d 788, 794 (4th Cir.1959) (quoting 70 C.J.S.1951 Perjury § 79). In Petite, the Fourth Circuit upheld the following jury charge:

Now, let me break it down. Knowledge of how the witness will testify does not make a defendant guilty. On the other hand, a defendant may be guilty without having instructed the witness what to say.

A lawyer may be guilty of subornation of perjury even though he has not instructed the witness to say so if he knows that the testimony the witness is going to give is false and if he knows that the witness knows that it is false and yet he causes or induces the witness to do it and puts the witness on the stand, and the witness does so testify; then the defendant may be guilty.

But mere knowledge of how the witness will testify is not of itself sufficient to make him guilty. He must, with the language I gave you, cause or induce. Petite, 262 F.2d

at 796 (emphasis added). Accordingly, there must be some affirmative act of procurement, in addition to merely *250 calling the witness to stand, to support an enhancement for subornation of perjury. [FN13]

FN13. One court, however, has held that mere silence can qualify as an affirmative act. See Tedesco v. Mishkin, 629 F.Supp. 1474, 1480, 1482 (S.D.N.Y.1986) (after hearing client's proposed false testimony, silence by attorney was understood to indicate agreement and was "tantamount to complicity," district court found that attorney had suborned perjury).

Here, there is no evidence that Livoti did anything more than call the perjuring witnesses to the stand in aid of his defense. In the absence of evidence that Livoti did anything more to procure or instigate the perjury, he cannot be found to have suborned perjury. This is not to say, however, that the obstruction of justice enhancement is not warranted. In United States v. Noland, 960 F.2d 1384 (8th Cir.1992), the Eighth Circuit upheld the trial court's finding of obstruction where the defendant elicited false testimony from her two minor children. Although the defendant contended that "there was no evidence that she suborned such perjury," the court held that the "solicitation of false testimony generally may be viewed as an obstruction of justice." Id. at 1391 (citing United States v. Lange, 918 F.2d 707, 709 (8th Cir.1990)). Although Livoti may not be guilty of suborning perjury because he did not procure the false testimony, the obstruction of justice enhancement still

applies because he solicited the false testimony by calling the officers to the stand.

IV. Basic Principles Governing Departures

I will not here address the substance of the defense or Government motions for downward or upward departures, respectively. It is, however, useful simply to review the basic principles governing departures. It is axiomatic that departures from the guideline range are appropriate only if the case is atypical or outside of the heartland, that is the set of typical cases embodying the conduct that each guideline describes. See Koon v. United States, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996); United States v. Rogers, 972 F.2d 489, 493 (2d Cir.1992). Instances are "atypical" if "they vary by reason of degree of seriousness, or frequency of occurrence, from the norm" and may justify an upward or downward departure. United States v. Ventura, 146 F.3d 91, 91 (2d Cir.1998). Finally, "[a] district court's decision to depart from the Guidelines ... will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." Koon, 518 U.S. at 98, 116 S.Ct. 2035.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

:

-against- : ORDER

: 98 Cr. 25 (SAS)

FRANCIS X. LIVOTI, :

DEFENDANT. :

----------X

Hon. SHIRA A. SCHEINDLIN, DISTRICT JUDGE

WHEREAS, the defendant FRANCIS X. LIVOTI is incarcerated pursuant to a sentence imposed by this Court on the 8th day of October 1998; and

WHEREAS, the defendant's well-being will be secured by incarcerating him in segregated housing in a Northeast Facility, and his attorney Stuart London has made an application before this Court that the defendant be incarcerated in segregated housing in a Northeast Facility;

ORDERED that the DIRECTOR OF THE FEDERAL BUREAU OF PRISONS is to select a Federal Prison that meets that criteria and that the DIRECTOR OF THE FEDERAL BUREAU OF PRISONS cause the

defendant be incarcerated in segregated housing in a Northeast Facility.

SO ORDERED
New York, New York
November, 1998

SHIRA A. SCHEINDLIN,

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

98 Cr. 25 (SAS)

FRANCIS X. LIVOTI

Defendant

New York, N.Y.

October 8, 1998

Before:

HON. SHIRA SCHEINDLIN,

District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
BY: MARK POMERANTZ
ANDREW DEMBER
SERENE K. NAKANO,
Assistant United States Attorneys

STUART LONDON
Attorney for Defendant

THE COURT: Good afternoon, Mr. Pomerantz, Mr. Dember, Ms. Nakano, Mr. London, Mr. Livoti.

I have reviewed the revised presentence report dated September 11, 1998, together with the addendum and the sentencing recommendation of the same date. I have also reviewed the following submissions of the parties: (1) defendant's objections to the presentence memorandum; (2) defendant's motion for a downward departure; (3) the government's sentencing memorandum and the materials referenced in that memorandum; (4) defendant's response to the government's sentencing memorandum; (5) letters from Angel Bonilla, the pastor of Anthony Baez's church, and Maribel Baez, the widow of Anthony Baez; (6) petitions calling for justice and equal treatment of Mr. Livoti signed by approximately 1,000 persons; and (7)

letters from the Director of the Tiebout Community Center in the Bronx and from Mr. Livoti's brother and his parents, and a potential employer.

Mr. London, have you reviewed all of these materials?

MR.LONDON: Yes, I have.

THE COURT: And do you have any objection other than those you have already made in all of your written submissions?

MR. LONDON: The only objection I have, Judge, is in the presentence report, when it specifically talks about the debts that my client has –

THE COURT: I am sorry, say it again, Mr. London.

MR. LONDON: On page 14 of the presentence report I have, Judge, which talks about the unsecured debts, it talks about credit card debt and it talks about unsecured loans, which I believe are referring to student loans. Mr. Livoti also had a boat which was repossessed, which is an outstanding debt of approximately $5,000, which we did tell Probation about but is not present in the report, and I

just noticed it in going through the report with my client.

THE COURT: And you suggest that what change should be made?

MR. LONDON: Well, if we can add $5,000 to the unsecured loans.

THE COURT: Any objection to that from the government?

MR. POMERANTZ: None at all, your Honor.

THE COURT: That correction will be made.

MR. LONDON: Other than that, I briefed my other objections.

THE COURT: Mr. London, have you gone over all of these materials with Mr. Livoti?

MR. LONDON: Yes, I have.

THE COURT: Mr. Livoti, do you have any objections other than those stated by your lawyer in all the written materials and just now?

THE DEFENDANT: No, I do not, your Honor.

THE COURT: Mr. Pomerantz, has the government reviewed all of the materials I just listed a moment ago?

MR. POMERANTZ: Yes, we have, Judge.

THE COURT: And do you have any objection other than those you have already made in all of your written submissions?

MR. POMERANTZ: We do not.

THE COURT: The presentence report will then be made part of the record in this matter and placed under seal. If an appeal is taken, counsel on appeal may have access to the sealed report.

As the Court and counsel discussed in a telephone conference held on October 2, 1998, Mr. Livoti would request a fact hearing, if the Court intended to consider certain materials submitted by the government, for the purpose of a proposed upward departure seeking a increase in Criminal History Category based on similar uncharged criminal conduct. The government informed the Court that at such a hearing it would only offer the written materials already submitted, but no live testimony. The written materials included reports of the Internal Affairs Bureau and the Civilian Compliant Review Board, as well as

records reflecting medical treatment of Livoti or those he arrested.

I informed the parties that based on that proffer, and after reviewing the documentary submissions, I could not find that Livoti committed any uncharged crimes, even by the standard of a preponderance of the credible evidence, with the exception of the incident regarding Manuel Bordoy and Ivan Cruz, as to which this Court held an evidentiary hearing prior to the trial. I note that none of the complaints reviewed by the CCRB were substantiated. Most were unsubstantiated and three were conciliated, abut those were the most minor incidents, two which involved rude language or conduct and the other involved a push. Thus I informed the parties that I would not be considering these materials in imposing this sentence. As a result, the defense withdrew its request for an evidentiary hearing. So, I ask again for the record: Are there any fact issues in dispute that require a hearing? Mr. London?

MR. LONDON: No, your Honor.

THE COURT: Mr. Pomerantz?

MR. POMERANTZ: No, Judge.

THE COURT: I therefore adopt the findings of fact as set forth in the revised presentence report. With respect to the objections raised by Mr. Livoti to the legal

conclusions of the revised presentence report, I have today issued an opinion setting the offense level and explaining my reasons for those legal conclusions.

I will not briefly summarize those rulings. The first task was to determine the appropriate base offense level. All parties agree that the appropriate guideline is found by applying Section 2H1.1(a), which requires the Court to use the greater of four choices, the first of which is the offense level from the offense guideline applicable to any underlying offense. The Probation Department and the government argue that the appropriate underlying offense is voluntary manslaughter, which carries a base offense level of 25. The defendant argues that the third choice in Section 2H1.1(a) should apply, which describes the use of force against a person and carries a base offense level of 10. I disagreed with both. For reasons fully explained in my written opinion which was issued today, I have concluded that the base offense level is that prescribed for involuntary manslaughter, where the conduct was reckless, which carries a base offense level of 14.

The next question that must be addressed in determining the offense level is whether to add 6 levels as required by the specific offense characteristics set forth at Section 2H1.1(b), which states that "if the defendant was a public official at the time of the offense or if the offense was committed under color of law, increase by 6 levels." Livoti argues that this increase should not apply to him because the offense of conviction requires that he act under

color of law, thus resulting in so-called double counting if the increase is given. Both the Probation Department and the government argue that this increase must be applied. As set forth in my written opinion, this increase is required. Thus the base offense level is increased from 14 to 20.

The next question that must be addressed in determining the offense level is whether to add 2 levels for obstruction of justice. Both the Probation Department and the government argue that because Mr. Livoti testified falsely in a state grand jury investigating the underlying offense, and because he called witnesses at this trial who gave perjurious testimony, this increase is mandatory. Livoti argues that both reasons must be rejected. Specifically, he argues that his grand jury testimony did not occur "during the investigation, prosecution, or sentencing of the instant offense," as required by Section 3C1.1. He also argues that because there is no evidence that he told the police officer witnesses what to say when they testified at this trial, he could not have suborned their perjury. For the reasons set forth in my written opinion, both of these arguments are rejected. I find, by the required standard, that there is clear and convincing evidence in this record that Mr. Livoti testified falsely in the grand jury and, while not suborning perjury, offered false testimony at this trial. For either of these reasons, the 2-level enhancement is warranted, thus raising the base offense level of 22.

Mr. Livoti has one prior conviction for assault and

reckless endangerment of a civilian, Steven Resto, which occurred in the course of arresting Mr. Resto for driving his go-cart on the sidewalk. During that incident, Livoti slapped Resto in the face, and later choked him with three fingers squeezing against his Adam's apple. These facts come from the trial record. According to Resto, Livoti did not stop choking him until a superior officer yelled at him to stop. Based on this conviction, Mr. Livoti received a sentence of 7 months in jail, resulting in 2 criminal history points pursuant to Sections 4A1.1(b) and 4A1.1(e)(2). As a result, he falls in Criminal History Category II. Thus his guideline range for offense level 22 at Criminal History Category II, is 45 to 57 months in custody.

The defendant Livoti is seeking downward departure on three separate grounds. He argues that he is entitled to a departure based on (1) the victim's conduct pursuant to Section 5K2.10; (2) the fact that he endured successive, burdensome state and federal prosecutions pursuant to Section 5K2.0; and (3) the potential for prison abuse pursuant to Section 5K2.0. As recognized by *Koon v. United States,* 518 U.S. 81 (1996), all of these are permissible grounds for a departure and the Court has the power to consider departing on these grounds.

The government is seeking an upward departure on two separate grounds. The government first argues that a departure is warranted under Section 4A1.3, which permits an upward departure when "reliable information indicates

that the Criminal History Category does not adequately reflect the seriousness of the defendant's past criminal conduct." With respect to the this ground, the government relies on Section 4A1.3(e) which states that such reliable information may include "prior similar adult criminal conduct." The government also seeks a departure based on "the extraordinary circumstances of this case." Such a departure is explicitly permitted by the Sentencing Guidelines. In Chapter I, Part A, introductory comment 4(b) of the guidelines, the Sentencing Commission stated that the guidelines sought to set out a "'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." This Circuit has held that cases are "atypical" if the criminal conduct "varies by reason of degree of seriousness, or frequency of occurrence, from the norm" and that such deviation or atypicality may justify a departure. *See United States v. Rogers,* 972 F.2d 489, 493 (2d Cir. 1998). Such a departure would fall generally under Section 5K2.0.

With that, I am now prepared to hear from counsel and Mr. Livoti with respect to the departures and the appropriate sentence. Mr. London, do you wish to be heard?

MR. LONDON: Yes, Judge. Specifically, Judge, let me address my comments to the *Koon* decision, which, as I am sure the Court would agree, it would be almost impossible to find another case which was on all fours with a Supreme Court case, other that Livoti's case and the *Rodney King* case, which involved the conviction of Sergeant Koon. Specifically, I would like to address myself to 5K2.0 under prison abuse.

This case clearly received widespread media attention. Judge, just by evidence of what is in this courtroom today, I don't think the government can allege that there has been no widespread media coverage. Whether this coverage is confined to the Northeast or not, I think for purposes of this argument, Judge, it clearly satisfies that requirement. What happens if a case receives widespread media attention, and what ill effects can that have on a defendant who has been incarcerated?

Mr. Livoti, Judge, is presently at MCC. He has only been there for two days and there is a contract out on his life from the Latin Kings. In the two days he has been at the Metropolitan Correctional Center, there have been gangs that have called out his name and indicated to him, whether it be Dominicans or Latins or part of all the Dominican or Latin King youth gangs that are in the federal prison system, that they are going to get him. He's had one hour of free time a day because he is locked in a cell. There is no protection for Officer Livoti in the federal

system.

I submit to the Court that, of course, they can put him in segregation, they can restrict the fact that he can't go in the yard because if he goes in the yard he is going to be susceptible to prison abuse. So when the government states in their papers that they don't understand the type of abuse I am referring to, what I am referring to is the Latin Kings, youth gangs.

It is also a matter of record, Judge, that when this case was tried, as an administrative proceeding, at 1 Police Plaza, that there were death threats from the Latin Kings, and Officer Livoti at times had to wear a bulletproof vest to even appear in court or at 1 Police Plaza. I know for a fact it is accurate because the Corporation Counsel at the time wanted me to be aware of the death threats. So I think it is fair to say that Officer Livoti is going to have a very difficult haul in the federal prison system.

I submit to the Court that in the *Koon* case the Court was considering the same sort of attention, the fact that he could be put in solitary confinement, which was the only way to safeguard him. I submit to the Court that the nature of Mr. Livoti's incarceration will be significantly more onerous than that of the typical prisoner. I don't think the government can object to that, and I submit to the Court, Judge, that that is a ground that the Court can depart, solely on that ground alone.

Secondly, your Honor, the successive state and federal prosecutions. This Court is well aware that Officer Livoti was tried and acquitted before Judge Sheindlin in Bronx Supreme Court. He was acquitted of the very charges that form the underlying base offense level in this case, which was criminally negligent homicide. I submit to the Court that it is not just the duration of the trial. The government argues that it was not as lengthy a trial as in the *Koon* case. The emotional and physical toll cannot be measured by a computer, Judge. An individual sitting on trial, with his life on the line, with the media watching every move you make, is a very burdensome obligation for any individual to go through. Officer Livoti has not just gone through that once, Judge, but he has gone through that twice, both on a state and a federal level. The same considerations, the mental, emotional, and financial burdens of successive federal prosecutions, are a very real punishment. I submit to the Court that *Koon* recognized that these successive prosecutions do have an impact on the mental and physical state of a defendant, and a downward departure was recognized by the Supreme court based on that factor.

Lastly, Judge, with respect to victim fault, I understand the sensitive nature of this particular crime, Judge. As the Court is well aware, this is a downward departure factor for the Court to take into consideration. Clearly, Officer Livoti has not had an opportunity to speak up until this point, and probably will speak when given his

opportunity today, Judge. And he has been much maligned because of the fact that he has not been remorseful. Officer Livoti, Judge, has been put in a situation where it has been impossible for him to be remorseful. He clearly has indicated to me on many occasions that he has both sympathy and empathy for the family. They have lost a caring, loving son, Anthony Baez – not because of the actions of Mr. Livoti. And his problem was that that would be misconstrued, if he showed remorse, as an admission of guilt. So he was caught in a situation where he wanted to say something so that he would not be vilified in the press, but it was difficult because of all the pending prosecutions that he knew were our there at the time.

When you get to victim fault, Judge, using the Court's own factual recitation, Anthony held his hands to his chest, with his elbows pulled in against his body, and Henry saw Livoti grab him by the arm and try to pull it towards his back. Anthony resisted having his arms pulled back, struggling not to be cuffed.

Clearly, we have Anthony Baez resisting arrest. Resisting arrest, under the New York State Penal Code 205.30, is a crime. Officer Livoti was acting as a police officer in attempting to rear-cuff him. When you talk about victim fault, Officer Livoti is not blaming Anthony Baez specifically for his death, but he put a set of facts in motion, a set of events in motion, which unfortunately led to his untimely demise, Judge. And when you talk about

the strength and size of the victim, compared to that of the defendant – my client is approximately 180 pounds; Anthony Baez was approximately 270 pounds – there was the resistance of the victim to avoid being rear-cuffed; he struggled and didn't want to be rear-cuffed, Judge.

In addition, what is important to note at this point, in the administrative proceeding which was tried – and I know during the sentencing phase the rules of evidence are a little bit more relaxed and the Court has taken many factors into consideration and I appreciate that – Officer Livoti was acquitted of violating the civil rights of David Baez, not Anthony but David. Why is that important? It is important because when he told David he was going to be arrested for failure to follow a lawful order, David was arrested without incident. He was rear-cuffed; he was put in the back of the patrol car. There was no problem, there was no resisting arrest, there were no allegations of excessive force by Officer Livoti. Had Anthony Baez reacted the same way, he would have also been placed in the back of a patrol car and would have brought to the precinct and presumably they would have been given summonses at that point.

The only reason I bring this point up, Judge, is to say, there is some victim fault here, not his fault for being killed, but he certainly could have reacted the same way his brother did, and I suspect we would not be here today.

In addition, Judge, in many instances, the actions of Anthony Baez, the actions of all the brothers, can be attributed here. We know that Henry Bothwell, for instance, had stated under oath that he grabbed at Officer Livoti during the prior testimony, whether it was in a state grand jury. So we have Anthony Baez resisting arrest, struggling, and his brother coming over to help in Anthony resisting by grabbing Officer Livoti, clearly a situation where a New York City police officer takes an oath to uphold the law and he was just enforcing a lawful order. I think it is important for all New York City police officers to be able to enforce orders, Judge, so that there be no chilling effect.

I understand this case got out of control for a variety of reasons, some of those being Mr. Baez's acute asthmatic attack. But specifically the fact that Officer Livoti was trying to simply arrest Anthony Baez, due to Mr. Baez's size, the fact that he resisted, the fact that his brother jumped in and grabbed Officer Livoti – all are factors to be considered with respect to this particular section having to do with victim fault.

In addition, Judge, I understand that this is discretionary, but I think that when you look at all three of these factors together, the only difference between this case and the *Koon* case is that unfortunately Anthony Baez died and a contributing factor was the acute asthmatic attack.

An argument can be made that the actions of the officers in the *Koon* case were worse than this. I believe I put a footnote in which indicated, Judge, that one of the officers said to Rodney King, "We played a little ball tonight, didn't we, Rodney? You know we played a little ball, we played a little hardball tonight. We hit quite a few home runs. Yes, we played a little ball and you lost and we won." Clearly, that shows an intent at a certain point in time to cause intentional injury to the individual.

That was never the case in this particular case, Judge. Officer Livoti was never heard stating, "I want to kill you, Anthony Baez." He didn't know Anthony Baez before this incident.

I submit to the Court that if the Court is going to look at the current state of the law and look for a case on all fours, clearly the *Koon* case is on all fours with this case. I understand it is discretionary with the Court, but I would urge the Court to make a downward departure pursuant to *Koon*.

Would the Court like me to address –

THE COURT: Address everything now.

MR. LONDON: Very good.

Secondly, Judge, I am sure the government is going

to use the case of *United States v. Ventura*, 146 F.3d 91 (2d Cir.1998), to stand for the proposition, Judge, that under the Sentencing Guideline 3C1.1, this Court has indicated that it is giving a 2-point increase for the obstruction of justice. It is my understanding the government is now going to argue for an additional increase under the guideline 5K2.0, and using this case – which is a June of '98 decision – using this case to buttress that position. I would like to distinguish this case, as I am sure the Court is well aware.

In this particular case, an individual who had originally agreed to pleased guilty did not come back to court for sentencing. The Court gave him a 2-point enhancement for obstruction of justice based on that fact. When he was rearrested and did not come back for sentencing, he provided document to his attorney which needed to be investigated by counsel and the Court. Pursuant to that investigation, the result was that these were forged documents, these were altered documents, in which he was attempting to gain a benefit by indicating that he was a juvenile, and the sentence the Court was about to impose would have been illegal.

I submit to the Court that this case is easily distinguishable from the case at hand. I would go to the language in the decision, specifically on page 97. When it talks about multiple acts of obstruction, especially when they differ in kind of have different obstructive objectives,

it can be found to fall sufficiently outside the heartland of 3C1.1, which was designed to address when departures will be warranted.

I submit to the Court the fact that the Court had found that Officer Livoti was not honest in two state grand juries – and, most respectfully, reasonable minds can disagree – and the fact that the Court has held that the evidence proffered at the trial, with the grand jury testimony that is tied together, and that is the language the Court used when they said it was the same, that you use the words together. I submit at this point the government cannot now come forward and say, Well, we want 2 points under the obstruction, but we also want another 2 points based on what I have just discussed, Judge, because that would be double counting. They have already gotten their 2-point increase under the obstruction of justice.

I submit to the Court this case is not identical to this case at all. There are different objectives which the defendant was trying to procure by his different sets of actions. In this particular case we have no different objectives. It is tied together as Officer Livoti's version of what occurred on that day.

The Court has sided with the family in her decision, and we respect that, although we disagree, but for purposed of this argument I do not feel any upward departure is warranted based on an obstruction when they have already

received that enhancement pursuant to the Court issuing the 37-page decision which I received earlier today. So I stress the kind of obstruction, the kind of evidence, in Ventura was completely different evidence. In this case it is tied together.

Now, Judge, it is my understanding, based on the conference call we had, that with respect to the increase for a criminal history, that the Court was not going to consider the unsubstantiated civilian CCRB.

THE COURT: And I said that today.

MR. LONDON: And you said that also. Is the Court specifically going to consider the Bordoy-Cruz incident?

THE COURT: Correct, as I told you I would consider, in the telephone conference.

MR. LONDON: All right. If I can just have one moment, Judge.

Judge, I will direct myself solely to the Bordoy-Cruz incident which the Court will consider. I did have an opportunity to cross-examine those individuals in this courtroom. I would submit to the Court, as I am sure the Court is well aware, that these individuals never even made a civilian complaint against Officer Livoti. In the case I

cited, which was *United States v. Joshua*, 40 F.3d 948 (11th Cir. 1994), the Eleventh Circuit held that a prior arrest record did not constitute a basis for assessing an upward departure, as those arrest records were nothing but charges. In the Bordoy-Cruz case, Judge, although it seemed like a min-trial we were having against Officer Livoti, the facts of that case were that the Bronx District Attorney's Office held Officer Livoti out as their complaining witness. They didn't prosecute Officer Livoti on that case. They didn't ask that Internal Affairs investigate him based on his behavior. They used him as their witness, they'd be vouching for his credibility. The Bronx District Attorney's Office prosecuted Bordoy and Cruz. Eventually they were acquitted, the point being that there is nothing to indicate that this should enhance Officer Livoti's prior criminal history.

I submit to the Court that had they filed a CCRB complaint, maybe the Court could consider that, had the District Attorney's Office directed a law enforcement or police investigatory unit to investigate that. But I submit that Officer Livoti was used as a witness by the Bronx DA's office, he was prepped by the Bronx DA's office, called as their witness to prosecute and convict Vordoy – actually they weren't both arrested. I think it was Bordoy, not Cruz, the point being the Bronx DA District Attorney's Office vouched for Officer Livoti. It is not in his criminal history, it is not an arrest in his criminal history, and I would ask the Court not to consider that as the basis for

any upward departure.

With respect to the individual who appears before your Honor, Judge, Officer Livoti, Mr. Livoti forfeited his pension when the New York City Police Department tried him and fired him over at 1 Police Plaza, Judge. He has already paid a penalty of about $1 million by giving up that pension. He was a New York City police officer for in excess of fifteen years. By them firing him, Judge, he gave up full medical benefits, he gave up pension. He had made over 500 arrests as a New York City police officer. He had worked a good portion of his life to attain that pension, which is a very important incentive for every police officer out there. And that was wiped away very quickly.

I submit to the Court that he has been a productive New York City police officer. If you look at, I believe it is, thirteen unsubstantiated civilian complaint reports, based on an officer working in the South Bronx making 500 arrests, that is not such a bad record.

This is an officer who has been vilified in the press because of this case, and stands here now punished not only in addition to what this Court is going to sentence him, because even if this Court gave him one day in jail, that would be a burdensome horror form him, as this Court, I am sure, is well aware, but his Criminal History Category is at a level II. Why? Because of the Resto case. I know the Court heard from Mr. Resto, and I know the Court kept

out certain evidence having to do with the fact that Mr. Resto had communicated with someone; that he testified to in an allied trial. We are talking about an individual who, although Officer Livoti received 7 months in jail for that case, and I know the Court read into the record about choking him until a supervisor came over, but if you want to talk about the hard facts about this case, which is important in my argument, there were no medical records submitted with respect to that case. There were no lacerations, bruises, contusions. Mr. Resto's case became a fact because of the Baez case. It was substantiated approximately 18 months after it was made. No action was going to be taken on it at all, but it was bootstrapped based upon this case.

But it gets worse than that, Judge. He is tried and sentenced to 7 months in jail. Suffice to say, I was a prosecutor in the Bronx for five years, and on a first arrest I have never seen an individual do 7 months in jail. That 7 months in jail jumps him from a Criminal History Category of I to a Criminal History Category of II. SO if you want to talk about an upward departure for criminal history, he has already received it, because he was treated unfairly in being sentenced on that case. He was sentenced to 7 months in jail. If you took a cross-section of the last ten years of what defendants had received in their first arrest for assault in the Bronx Criminal Court, if they received any jail I would be surprised, let alone 7 months.

So, I submit to the Court that he has already been penalized under the Criminal History Category pursuant to the designation because of his Resto conviction.

In addition, Judge, Officer Livoti has submitted, I believe, about a thousand signatures on a petition. As the Court looks around the courtroom, you can see there are representatives from the Police Benevolent Association present here. There are many of his officers who are present here today. Officer Livoti hasn't even been able to have visits from his good friends who are police officers due to Police Department restrictions. He has become an isolated man because of this case, Judge. He is being punished every day because of this case. Officer Livoti could have submitted a thousand more names. There is a lot of support for him, not because they know who Officer Livoti is, but because they understand the dangers of a police officer on the street.

I submit to the Court that, with respect to Officer Livoti in this case, the whole situation got out of hand, in large part due to the asthmatic condition and obesity of Anthony Baez. Some would argue that Officer Livoti at times can be overagressive. I think the truth probably lies somewhere in the middle, Judge.

I am asking this Court to temper justice with mercy and understand that the Court system, the judicial system, has exacted a huge penalty from Officer Livoti already.

They have taken away a million-dollar pension, they have taken away his liberty, they have made it impossible for him to even have any recreational privileges while he is incarcerated. He has been sentenced to 7 months in jail in a state case in which a normal defendant would get a conditional discharge or they would probably allow him to plea it down to a discharge.

His family is in the front row. His girlfriend is in the front row. I just want the Court to understand that there is an individual behind the charges. He is not a monster, he is not a villain. He is an individual who has actually been probably one of the more standup members of his family, having tried to deal with the code of a police officer each and every day on the street. As the Court can read by the community leader who submitted that letter, Officer Livoti was out on the street dealing with the community.

I would just like to address one other comment, Judge. In the letter that the Court received, I believe Mr. Baez's wife commented on the fact of his proven pattern of racism. Officer Livoti doesn't have a racist bone in his body, Judge. I submit to the Court theat he has patrolled the streets of the Bronx, which is predominately a minority urban community, for over ten years with little or not racial incidents, Judge.

This is obviously a situation where he has to deal with the consequences of his actions and the consequences

of the Court's determining the legal arguments. I just ask this Court to temper justice with mercy. Make a downward departure pursuant to *Koon*, which is on all fours – as the Court knows, it is a Supreme Court case – and reject the government's contention of an upward departure. They have received their upward departure for obstruction of justice. On his criminal history, he has already been penalized based on him being in Criminal history Category II.

Lastly, Judge, I know the Court has the discretion and the power here, and I would ask this Court, after sentencing is over, to confine my client to a facility in the Northeast. I would also ask that the Court make a recommendation for boot camp. I would also ask the Court to run any time that he received here concurrent with the 7 months he is serving in the Bronx House of Detention.

THE COURT: Thank you, Mr. London.

MR. LONDON: One moment, Judge?

(Pause)

MR. LONDON: Lastly, Judge, and most important, the writ that the Court signed bringing him here today indicates that when the conditions are satisfied that he be returned to the Bronx House. If that can be so ordered that it be done forthwith, that he be brought back

to the Bronx House immediately, such as tonight, that would avoid any problems which he is having significantly at the Metropolitan Correctional Center.

THE COURT: Thank you, Mr. London.

Mr. Livoti, do you wish to say anything at this time?

THE DEFENDANT: I will be very, very brief, ma'am. What Mr. London said relative to my expressing remorse in the case is very, very true. The immediate attention that was given to me commencing shortly after December 22, 1994, up until this day made it impossible for me to say anything of a conciliatory or apologetic or remorseful nature, which surely would have been misconstrued and would have been taken to be an admission of guilt. It may seem insignificant to the Court or others, but to me I make a very sharp distinction between remorse and regret, culpability. I just want the Court to appreciate that.

Also, I have to agree with Mr. London in that being dismissed from the New York City Police Department isn't like being fired from a delicatessen. It carries with it the significance of a dishonorable discharge from the military.

In addition, I also now have a felony conviction. I was privileged at my first pretrial appearance before you to watch you sentence another man, and I know you went to

great lengths to explain to that man, a fellow that was accused of forging prescription blanks, what the weight of a felony conviction will do to him when it follows him the rest of his life. What I am trying to say to the Court regarding that is that if I got any job interview, I would have to overcome, in outlining what I did for the last fifteen years in my job with the New York City Police Department, the circumstances under which I left it.

I also now have this felony conviction. I am not going to get a job at IBM or any other firm or company or any field of endeavor, where I am employed by a third party, where I am going to be able to earn any type of living even remotely approaching the living that I had been earning. My future is going to have to be carved out solely by me. I am going to have to be self-employed or start a business or something.

To that end, I became certified as a personal trainer. I have a professional athlete who is willing to hire me as his conditioning coach. That employment is contingent upon how long I actually incarcerated, because a career athlete, you know , is something which is finite. I would like to go back to school to get a degree in exercise physiology. These are all the things that I have lost and I am trying to regain.

All I would ask this Court is to give me an opportunity to salvage what is left of the remainder of my

life before too much of it is expired for me to begin to build it again. I also have a very, very beautiful young girl who I intend to marry. I would like to start a family of my own, have my own children, but I don't envisage my doing that at 50 years of age. I would prefer to do it sooner rather than later.

I don't know what else I could say to the Court. I think that theat pretty much summarizes my sentiments.

Also, Mr. London reminds me, my parents aren't very young, and I realize that this has been a tremendous burden to the Baez family, no question about it. The loss of a child is probably the greatest pain that anybody can experience, no question about that. I never forget the worst day I ever experienced in the New York City Police Department was the day when I was three years on the job and I gave mouth to mouth to a 3-month old baby who died. That, of all the experiences, was the worst experience of my life, my career. But my parents are parents too. My father will be 70 at the end of the month. I would like to be able to know that when I come out of jail he will still be alive. I don't want to have to be removed from the correctional facility to have to go to his funeral. I was already deprived of going to my sister's wedding this past Friday, because the Bronx District Attorney's Office insisted that I surrender prior to that time for that express purpose. They denied me that privilege. I am missing big pieces of my life every day. They can't be replaced.

So I would ask that you at least afford me the opportunity to go and rebuild. It is not going to be an easy road. Thank you.

THE COURT: Thank you, Mr. Livoti. Who is speaking for the government?

MR. POMERANTZ: With the Court's permission, your Honor, Mr. Dember would speak very briefly with respect to the downward departure motion that counsel has made and with regard to Mr. Livoti's Criminal History Category, and I would very briefly address the government's upward departure application.

THE COURT: Mr. Dember.

MR. DEMBER: Thank you, your honor.

Your Honor, first I will address the downward departure motion. Counsel relies exclusively on the *Koon* case to support his arguments that the three based he provides are legitimate and your Honor should exercise your discretion in granting it. Counsel ignores two very important facts in this particular case that distinguish it and which warrant the denial of this motion entirely.

Those two facts are, your Honor: Unlike the *Koon* case, where the victim was assaulted and lived, Anthony Baez is dead. The second significant and very important

fact, your Honor, is the fact that, to my knowledge, and according to my reading of the decisions, the District Court, 2d Circuit Court, and the Supreme Court decisions, in the *Koon* case the defense was not based on perjured testimony, as it was here. The same testimony, your Honor, the same statements, the same witnesses, the same testimony, was offered in state prosecution. Let me briefly just discuss each of the grounds on which counsel requests a downward departure.

Let me first talk about the defendant's susceptibility to abuse in prison. This case is clearly distinguishable from *Koon*, your Honor. Counsel has argues this case has gotten widespread publicity. We concede it certainly has had widespread publicity throughout the country like the *Koon* case. The downward departure in that particular instance, your Honor, was largely based on the fact that a videotape taken by a lay person of the actual assault in progress was played numerous times on national television. So, not only did people hear about the incident, people could actually see the police officers assaulting Mr. King, who was the victim in that case, and could see Mr. Koon, the sergeant, take no action to stop that assault. This is quite different, extremely different, your Honor.

Let me also add, your Honor, that, to my knowledge at least, unlike the *Koon* case, as your Honor is aware, this defendant has contribute to the media coverage of his case. He has given interviews to television stations, radio

stations, magazines and newspapers. He went on a cable program, Rivera Live, and stated his views on the case. He has contributed to the media attention. For him to now turn around at this stage and benefit from his own appearance in the media, and claim that is a basis for a downward departure because people will know about the case, shouldn't be granted, your Honor. It is simply wrong, when he himself has contributed to it and now wants to use that as a benefit.

I have spoken with the Bureau of Prisons, your Honor. As we state in our papers, there are many facilities throughout the country to which Mr. Livoti can be assigned. He would not normally be assigned to the Northeast because of the publicity in this case. In fact, I confirmed that today, your Honor, with the actual individual who will designate where Mr. Livoti will be assigned. They would normally not assign him in the Northeast, not assign him anywhere that this case got publicity. To the extend that he might ever meet somebody in a federal facility that he knew, either that person or Mr. Livoti would be removed from that facility as soon as it was learned. To say that the prison system cannot protect him, your Honor, is simply unsupported by anything the defendant has offered your Honor to consider. As actually a different court than *Koon* found, the Bureau of Prisons can protect safely police officers who have been convicted of crimes and who have served sentences.

Let me move on, your Honor, to the second basis for this downward departure motion, which is the successive prosecution. Counsel again relies on generalities in his argument. He doesn't offer up the fact of how Mr. Livoti himself actually has suffered as a result of the successive prosecutions. His argument, your Honor, would apply in any case were there is a successive prosecution, and that is not what the Supreme Court said. In the *Koon* case they cited, he had a very lengthy state trial.

Let me add, your Honor, a point I made before. In this particular case, in this courtroom, before your Honor, the defendant knowingly offered perjured testimony. That same testimony was offered at the state trial. We may have never had a federal prosecution, your Honor, if perjured testimony, had not been offered in the state prosecution. For him to then turn around and say, I have suffered because of the successive prosecutions, when he himself has offered perjured testimony each time, would be wrong, your Honor, and clearly is not what *Koon* considered.

Finally, your Honor, your own decision issued this morning, your Honor, describes, obviously, your findings of fact as to what actually happened in the early morning hours of December 22, 1994. You clearly state here, your Honor, that Anthony Baez did not provoke what happened to him; that his brother did not provoke what happened to him. The mere fact that he had his hands on his chest and

didn't want to be rear-cuffed, certainly, your Honor, is not a basis for a downward departure because he refused to put his hands behind his back.

The guidelines, your Honor, that deal with this issue, 5K2.10, list the various facts your Honor has to consider in determining whether this downward departure factor should be considered. When one looks at those factors in total, one knows that one has to see that, for there to be a downward departure, the victim's conduct and the defendant's conduct have to be somewhat proportionate. In this case, your Honor, certainly it is highly disproportionate for a person who is being arrested, who merely puts his hands on his chest, to then have to suffer a lethal choke hold applied by a person who know full well it was a lethal choke hold, that it was outlawed by the Police Department, and that it caused death. The defendant's disproportionate reaction to Anthony Beaz's holding his hands to his chest clearly establishes that this basis for a downward departure is inappropriate.

Let me talk, your Honor, just briefly now about the government's request for an upward departure based on the fact that, in our view, the defendant's Criminal History Category does not accurately reflect his true criminal history. If I may just say, your Honor, the conviction that he is now serving a sentence for and the sentence he received, counsel claims, is disproportionate and overstated. In our view, your Honor, it is not simply a

person who assaulted another person. It is a person who is a police officer who was required to uphold the law and apply the law, for which he was convicted and given a sentence. Just as, under our criminal guidelines, your Honor looks at the underlying conduct and then enhances it 6 levels when one violates one's civil rights under color of law, it is understandable why, in that situation, a judge would have sentenced somebody to a greater sentence than an average person who is convicted of assault in their first conviction.

Let me talk about Bordoy-Cruz. Your Honor heard Mr. Bordoy and Mr. Cruz testify. We introduced during that hearing their medical records. This is yet another example of this defendant assaulting civilians who were not engaged in wrongdoing, who were not committing crimes, and because of a whim, or for whatever reason he had, he ends up assaulting them.

The underlying circumstances of that incident, your Honor, are very much similar to the case of Steven Resto and painfully similar to the case of Anthony Baez. They were doing nothing wrong, they were violating no law, and what ended up happening was that this defendant assaulted Mr. Bordoy, fractured his jaw in three places, requiring hospitalization and surgery. For what? For simply telling Mr. Livoti that his friend, Mr. Cruz was not involved in wrongdoing and had been with him moments before and had gotten out of his car.

I submit, your Honor, both of those individuals were very credible witnesses. Their testimony was substantiated by the medical records your Honor saw. The fact is that they were arrested, and your Honor should recall what they were arrested for: resisting arrest, disorderly conduct. That sounds very familiar, your Honor. Mr. Bordoy took his case to trial and was acquitted by a jury. The fact that the DA's office may have believed Mr. Livoti or not questioned Mr. Livoti or accepted his testimony is irrelevant. The fact that Mr. Bordoy and Mr. Cruz didn't file a complaint is irrelevant. They were represented by counsel. They filed a civil lawsuit.

I submit, your Honor, their case is strikingly similar to Mr. Baez's and Mr. Resto's. Their testimony is credible. They each were assaulted and suffered injuries. Obviously, Mr. Bordoy's injury was far more serious. Mr. Cruz, though, suffered injury as well to his shoulder.

It is our position, your Honor, that this is a proper basis for an upward departure. It is credible, believable testimony, and your Honor should go the next Criminal History Category, which is Category III. We urge you to find that this in fact happened and find that at least 2 levels are warranted in going to the next level on the Criminal History Category. Thank you.

THE COURT: Thank you, Mr. Dember. Mr. Pomerantz?

MR. POMERANTZ: Thank you. Your Honor, I will just speak briefly with regard to the government's application for an upward departure. The Court has already considered the whole trial record and received lengthy submissions. This morning your Honor commented that an upward departure, according to Second Circuit law, is appropriate if the defendant's conduct varies by reason of degree of seriousness form the norm. It is the government's position that this crime and the attendant circumstances do vary form the norm by several degrees of seriousness, and it varies form the norm as well on several levels.

One is its impact on the Baez family. The Court has considered and mentioned the letter received from Anthony Baez's widow. The Court saw the testimony of the Baez family brothers. David Baez in particular walked away from this incident as a very angry young man as a result of this defendant's conduct.

During the trial, your Honor, I had an interchange with Ramon Baez, Sr. that I would like to share with the Court. While the jury was deliberating, he commented on what a long process that this had been: two state grand juries, a state trial, a Police Department proceeding, a federal grand jury, and now a federal criminal trial. I told him that I hoped that the jury's verdict in this case could help him put this whole tragedy behind him. He told me

that he and his wife will never be able to put this behind them. And I believe that.

The harm that was done to the immediate victims in this case, the victims who were humble, law-abiding and decent people, was, I submit, extraordinary. And it was aggravated to the very end with the claim that the victim here provided the incident, about which I won't comment further because your Honor has already found the facts in the opinion.

There are other respects as well in which the seriousness of the defendant's conduct is atypical. The obstruction of justice that this defendant perpetrated goes will beyond the norm. He perjured himself in a state grand jury. He gave similar false testimony in administrative proceedings. The Court already found the he solicited false testimony of defense witnesses. He did the same thing in state court. He did the same thing in the Police Department hearing.

Apart from the number of instances, your Honor, the nature of the obstruction is of the utmost seriousness. This defendant, by giving false testimony, by soliciting other police officers to lie on his behalf, was part of a police cover-up of a death in custody. There are few acts of obstruction that are so destructive, so serious in their impact on the community's respect for law and order, as a police cover-up of the kind that this defendant participated

in, in the effort to avoid responsibility for his crime.

With regard to *United States v. Ventura*, we do indeed rely on the *Ventura* opinion, which is a recent opinion of the Second Circuit. The Court there commented that if the nature of a defendant's obstruction departs sufficiently from the heartland of the Federal Sentencing Guideline because the defendant engaged in multiple instances of obstruction, or because his obstruction is distinguished by its triviality or seriousness, so that the defendant's conduct is fairly seen as obstruction of a kind or to a degree not adequately taken into account by the guidelines, a departure from the normal 2-level enhancement may be appropriate. it's the government's view that te seriousness of the obstructive conduct that took place in this case warrants and entitles your Honor to supplement an upward departure.

There are other respects in which this defendant's conduct, we submit, was especially serious. This is a defendant who was warned, who was called aside and told to conduct himself appropriately. The impact on the police of this defendant's conduct is substantial as well. Our office works with the police every day. An offense like this makes it more difficult for good and honest police officers to do their jobs. They have to payroll the city streets and be viewed with more fear and suspicion from the citizenry because of conduct like the defendant's conduct in this case.

Ultimately, Judge, the harm suffered by the public in this case is especially serious. The defendant, by his conduct, by his perjury, by his public statement, has aggravated the seriousness of the offense on every level. Members of the public are entitled, when they see a police officer on the street, to believe that officer is there to serve the public. Ramon Baez again said it on the witness stand. He told your Honor and he told the trial court jury that he had raised his sons, including Anthony Baez, to believe that the man in blue is their only friend on the street. And what this defendant did shook the public confidence in law enforcement and the police in a very tangible, dramatic, and serious way.

For all of these reasons, your Honor, we believe the Court should depart form the guidelines and impose a sentence that recognizes the full seriousness of the defendant's crime.

THE COURT: Thank you, Mr. Pomerantz.

I will first rule on the departures, and then I will tell you the sentence I intend to impose. I will ask if there are any legal objections solely – not a reargument, but legal objections. If there are none, then that is the sentence that I will impose.

Do you still request a Northeast designation, Mr. London?

MR. LONDON: One moment, Judge.
(Pause)

MR. LONDON: Judge, I will withdraw the Northeast designation and just request, in the opinion of the Bureau of Prisons, the safest facility.

THE COURT: Thank you.

I decline to grant a downward departure. The request for a downward departure based on victim fault is particularly inapplicable in this case. Based on the fair preponderance of the credible evidence, I find that the victim committed no criminal act and never threatened the defendant. Thus there was no provocation warranting the application of a potentially lethal choke hold. The other two grounds for a downward departure do have an adequate factual predicate. Because he was formerly a police officer, Mr. Livoti faces the possibility of abuse while in prison and he has endured successive prosecutions. Nonetheless, in the exercise of my discretions, I am declining to depart below the prescribed guideline range, for reasons that will be set forth more fully at the time sentence is imposed. However, both of those arguments will be taken into account in fashioning the appropriate sentence.

I am, however, granting the government's two request for an upward departure. Specifically, I find, based

on the evidence submitted at the pretrial hearing, that Mr. Livoti engaged in prior similar criminal conduct, not resulting in a conviction. As a result, I am granting a so-called horizontal departure in Criminal History Category.

On September 30, 1990, Mr. Livoti arrested two people, Manuel Bordoy and Ivan Cruz, neither of whom was engaged in any criminal conduct. During the incident he punched one of the men in the face, fractured his jaw. He grabbed the other man by the throat and smacked him in the face ten to fifteen times, in the patrol car while he was handcuffed. The victim was hospitalized. The charges against one of the men, for disorderly conduct and resisting arrest, were dismissed. The other man was charged with obstructing governmental administration and resisting arrest, but was acquitted at trial. Obviously, that jury did not credit Mr. Livoti's testimony. These facts were proved at a pretrial hearing, at which I found both victims entirely credible.

Thus the Court is aware of three incidents, two of which were convictions, and therefore proved beyond a reasonable doubt – that is, the Baez case and the Resto case – in which Mr. Livoti acted violently and recklessly, causing serious bodily injury to his victims. As a result of the one uncharged incident, which is not included in the calculation of his Criminal History Category, I find that the calculated history does not reflect the seriousness of the defendant's past criminal conduct and therefore increase

his Criminal History Category by 1 level to Category III. At offense level 22, this would require a guideline sentence of 51 to 63 months in custody.

I am also granting the government's second request for so-called vertical departure in the offense level. There are several factors that take this case outside the heartland of typical civil rights violations. First, there is the innocent conduct of the victim. There are times, in arrest situations, where police officers are unduly violent. These are always unfortunate. However, when most such events occur, there is often some threat or provocation that at least triggers the improper police conduct. In the *Koon* case, for example, the victim, Rodney King, was a large, intoxicated man who was arrested for driving his car in excess of 100 miles per hour. After being chased by police, King finally stopped his car but was slow to comply with police orders to exit his vehicle. He subsequently defied police orders to remain on the ground and instead rose form a prone position and charged one of the officers, causing the officers to retreat. While none of this excused the police misconduct, it at least provided some explanation for their outrageous behavior. Of course, another distinction in the *Koon* case, which Mr. Dember referred to, was that, as it happened, Mr. Livoti's victim died. Officer Koon's victim did not.

There are several factors that make this case atypical. First, the event should never have happened at

all. It appears there was no probable cause for the arrest of either David or Anthony Baez, since neither had been involved in any criminal activity. The second is that Mr. Livoti acted without any real provocation. The only actions that one might even argue were provocative include David Baez's direct contradiction of a police order "to go home"; Anthony Beaz telling Mr. Livoti that he know his rights and knew that Livoti had not right to arrest David because David had done nothing wrong; and Anthony Baez's insistence that he be cuffed in front rather than behind his back, maybe because he knew he wasn't a well man. This is not the kind of provocation that begins to explain Mr. Livoti's conduct, except he clearly did not like to have his authority challenged or his orders disobeyed.

The third unusual circumstance in this case that warrants an upward departure is that Mr. Livoti had been personally and specifically warned not to engage in any unnecessary confrontations with civilians. This warning was given because of prior complaints. In addition, Mr. Livoti admitted he was aware of a training film warning the police of the dangers of using choke holds. He was also aware of an interim department order forbidding the use of choke holds, and the then-current Patrol Guide banning the use of choke holds. This is not the case of a rookie police officer who became frightened, or a veteran who was reasonably in fear of his own safety. Rather, because he had previously engaged in violent conduct, he was specifically warned not to engage in this type of conduct

again, but nonetheless went right ahead and did it again in the face of such explicit warnings. Because this is an extraordinary case, falling outside the heartland of such cases, a 4-level upward adjustment to level 26 is warranted. Thus the guideline range at level 27, Criminal History Category III, is 78 to 97 months in custody.

I am required to explain why I departed by 4 levels, rather than more or less.

Just before I do that, I meant to add that I reject the argument the *Ventura* is applicable in considering the upward departures, and I do not depart on the ground of obstruction of justice, as I have already considered the same conduct in granting the 2-level enhancement, so that is not a part of my reasoning because I think the same conduct is being argued again. In that case there were two different kinds of obstructive conduct.

In any event, I am required to explain why I departed by 4 levels, rather than more or less. This is not an easy task and I would like to explain it. First of all, it is noted that a Court has the discretion to depart upward or downward when the circumstances warrant a departure, and the discretions to decide how much to depart. The Probation Department recommended a sentence of 151 months in custody. At page 29 of its sentencing memorandum, the government indicated that it would be satisfied with a sentence of 121 months or more. With

these recommendations in mind, I considered the appropriate departure.

In order to be in the range requested by the government, I would have to depart at least to level 28, which provides for a guideline sentence of 109 to 121 months in custody. I rejected this proposal based on several mitigating factors. The first was that Mr. Livoti has been a police officer for 15 years, making over 500 arrests. The Court is aware that it is not easy to be a police officer, risking your own life for the safety of others. While in the end he disgraced the badge he wore, he did receive 17 commendations by the Police Department, most of which were obtained during the arrests of dangerous felons, including those who possessed guns and sold drugs. These years of hard work cannot got unrecognized, and they count in part for my decision to depart by only 4 levels and reject the recommendation, both of the Probation Department and of the government.

In addition, I considered as mitigating factors the two arguments raised by Mr. Livoti in support of his motion for a downward departure - namely, enduring successive state and federal prosecutions for the same conduct; and the expectation that he may be especially subject to prison abuse, given his former position and the notoriety of this case. Finally, I considered the petition and letters I received in support of Mr. Livoti. I can only tell you that they did make a difference in the sentence.

However, by far the most important reason for not departing further is that I don t believe that Mr. Livoti is solely responsible for what happened here. The Police Department did Mr. Livoti and the people of this city a grave injustice when it permitted Mr. Livoti to remain on active patrol, knowing of his propensity for violence. There is no doubt in my mind that the Department knew, or should have known, that Mr. Livoti was dangerous. There had been enough prior complaints and incidents to alert those in charge to the fact that Mr. Livoti should be off the streets, if not off the force. Indeed, there are allegations that senior police officials had rejected a recommendation by Mr. Livoti's commander that he be transferred to a clerical job or a less stressful precinct. Yet, instead of protecting the people of the city, and helping Mr. Livoti through affirmative intervention, such as counseling and treatment, the Police Department let him remain on the streets, knowing that one day a real tragedy would occur. I therefore conclude that a 4-level departure, rather than a greater departure, is sufficient to permit an adequate sentence.

On the other hand, any lesser departure would be inadequate to permit the Court to impose a proper punishment. Unlike the situation in the *Koon* case, Mr. Livoti's violent and unprovoked behavior caused the death of an innocent man. While it may be true that he did not intend to kill Anthony Baez, and the Baez was an obese man suffering from both chronic asthma and an acute

asthmatic attack during the incident, the fact is that Mr. Livoti's conduct did cause his death. Such a crime warrants a significant sentence. The guideline range at level 26, Criminal History Category II, is 78 to 97 months in custody.

No I will tell you the sentence that I intend to impose I will impose a sentence of 90 months in custody, to be served concurrently with his state sentence as required by Section 5G1.3, to be followed by a three-year period of supervised release. In addition, Mr. Livoti is required to pay a mandatory assessment of $50, which payment is due immediately. Mr. Livoti is also required to pay a find of $12,500, which may commence during the defendant's imprisonment through the Inmate Financial Responsibility Program. If not satisfied by the time of release, the remainder of the fine shall be paid in monthly installments of 10 percent of his gross monthly income.

Defendant is to be supervised in the district of his residence, and the standard conditions of probation as recommended by the Probation Department shall apply. The following mandatory conditions also apply: (1) the defendant shall not commit another federal, state or local crime; (2) the defendant shall not illegally possess a controlled substance; and (3) the defendant shall not possess a firearm or other destructive device. The mandatory drug testing condition is suspended due to my conclusion that this defendant poses little or no risk of any

future drug abuse.

The following special conditions are also imposed: (1) that the defendant provide the probation officer with access to any requested financial information; and (2) that the defendant not incur new credit without the approval of the probation officer.

My reasons for this sentence follow:

The proposed sentence is toward the high end of the guideline range that I have already determined. The highest, of course, was 97 months, and I must say I was affected today by Mr. Livoti's statement and Mr. London's statement, which accounts for my not being at the absolute highest point in that range. As alluded to earlier when addressing the defendant's request for a downward departure, I do not believe that any shorter sentence would adequately punish Mr. Livoti for the crime that he committed against Anthony Baez, the Baez family, or the people of this city.

Mr. Livoti, you killed an innocent man and you will always have to live with that. You disgraced the badge you wore and you will have to live with that as will. You decided that you were the law and that you were above the law. You were terribly wrong on both counts.

In fashioning a proper sentence I took account of many things. As noted in the opinion issues today, you

acted with reckless disregard for human life. But, in addition, I cannot overlook the way you have handled yourself since this investigation began. You have obstructed justice by lying to the grand jury and offering perjured testimony at trial. You have blamed the victims, the Baez family, for "asking for it" and for "escalating this situation" when you yourself are to blame. You have accused the family, who suffered the loss of a son, brother and husband, of greedy motivation, and have attacked this prosecution as corrupt. Until today I hadn't heard an expression of remorse.

Hopefully over the next few years, you will begin to gain some understanding of how and why you failed as a police officer and, frankly, as a human being. Only when you obtain that understanding, will you feel true remorse and hopefully begin the process of rehabilitation.

This is a very important case. A civilized society cannot look the other way when its law enforcement officers commit crimes against the very citizens they are duty-bound to protect. Anthony Baez, a decent, hard-working family man, who ironically hoped to be a police officer himself, died for no reason. Mr. Livoti, on the other hand, viciously attacked people he was arresting on at least three occasions. Three of those people were arrested without any cause at all. None of those four victims was engaged in any threatening activity – indeed, the only criminal conduct in any of the incidents involved driving

a go-cart on the sidewalk.

But as noted earlier, Mr. Livoti is not solely to blame. The Police Department bears some share of the responsibility for Mr. Baez's death and Mr. Livoti's crime. Because an officer who engaged in a pattern of aberrant violent behavior was permitted by his superiors to remain in a position of authority and responsibility, I have concluded that a 90-month sentence adequately serves all of the purposes of sentencing. I believe that this sentence appropriately punishes Mr. Livoti. I also hope it sends a strong message to police officers and to the people of the City of New York that police brutality will be punished.

What this conduct has caused is a breach of trust. Mr. Livoti has caused a significant segment of the population of this city to lose faith in the police. These people can no longer trust the police to act with courtesy, professionalism and respect, as advertised on the sides of police vehicles. This loss of faith, indeed loss of respect, can have the most severe ramifications. We view ourselves as a society of laws, not of men. It is important that all allegations of police misconduct be investigated, prosecuted and punished in a serious manner. This sentence is intended solely to punish Mr. Livoti for his criminal conduct, but I hope it also has the effect of restoring confidence in the criminal justice system and the rule of law.

Mr. London, are there any legal objections before sentence is finally imposed?

MR. LONDON: No, Judge. I would just repeat if the Court can endorse that he go back to the Bronx House today.

THE COURT: Yes. I will make every effort to get the writ endorsed forthwith.

MR. LONDON: Thank you.

THE COURT: Mr. Pomerantz, are there any legal objections before sentence is imposed?

MR. POMERANTZ: There are none.

THE COURT: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of this Court that the defendant, Francis X. Livoti, is sentenced to 90 months in

October 7, 1996

Part 28

INDICTMENT # 8070/95

THE PEOPLE OF THE STATE OF NEW YORK

- against-

FRANCIS X. LIVOTI

BEFORE: HONORABLE GERALD SHEINDLIN,

JUSTICE

(Appearances same as previously noted)

(Whereupon, the following takes place in open court among counsel and the defendant)

THE CLERK: Case on trial, People of the State of New York against Francis Livoti.

The defendant, his attorney, the ADAs are all present, your Honor.

THE COURT: Thank you. Good morning, counsel.

There are cert in aspects of this case that are clear and beyond dispute; Anthony Baez' death was tragic, unnecessary and avoidable.

It is clear to this Court that the defendant's conduct failed to rise to the level one would expect of a professional. His use of foul language and the unnecessary mimicking of a civilian's affliction was demeaning and insulting. His behavior did not serve to calm the waters of this rapidly unfolding minor conflict.

Indeed the defendant's rude confrontational attitude and his raw disrespect heightened the intensity of the emerging friction. This should not be and must not be the role of a police officer who has a sworn responsibility to be a peace maker as well as a peace-keeper. Whether the defendant shamed the uniform that he wore I leave for the resolution by other tribunals, but it cannot and must not go unnoticed.

With that being said, I turn now to the law and to the major facts that this Court finds to have been established by the believable evidence.

A person is guilty if criminally negligent homicide when, with criminal negligence, he causes the death of another person.

To establish this charge, the People are required to

prove beyond a reasonable doubt the following four elements:

One, that on or about December 22nd, 1994, in the County of the Bronx, the defendant placed Anthony Baez, in a choke hold thereby creating a substantial and unjustifiable risk of death to Anthony Baez.

Three, that the defendant's failure to perceive the risk constituted a gross deviation from the standard of care that a reasonable person would have observed in that situation.

And lastly, that the defendant's act of placing a choke hold on Anthony Baez caused the death of Anthony Baez.

The distinguishing feature of this crime is criminal negligence, conduct which is criminally negligent is different from ordinary negligence, which gives rise to civil liability and for which a person may be required to respond in money damages.

Criminal negligence requires proof that the defendant's conduct was of such a gross, such a flagrant character as to warrant the imposition of criminal liability.

A person acts with criminal negligence with respect to the death of another person when he fails to perceive a substantial risk that death will result.

The risk must be of such a nature, the risk must be of such a degree that the failure to perceive it constitutes a gross deviation of standard of care that a reasonable person would have observed in that circumstance.

The People's theory in the instant case, according to their opening statement and also consistent with major parts of their summation, is that the forbidden choke hold applied to Mr. Baez's neck by the defendant was the sole cause of his death and that Officer Livoti failed to perceive the substantial and unjustifiable risk that death would result by placing Mr. Baez in the forbidden choke hold.

The prosecution, in an unusual strategy, presented evidence on its direct case which described two sharply divergent and conflicting accounts of what happened on Cameron Place the night of December 22nd, 1994.

By calling witnesses to the stand who did not implicate the defendant in blameworthy criminal behavior, the prosecution placed itself in a significant disadvantage.

Cross-examination is an important tool and a valuable time honored method of testing the truth, to testing the accuracy of a witness' testimony.

Here, the prosecution elected to forfeit the opportunity to cross-examine major witnesses whose version of the facts dramatically conflicted with their

theory of the case.

This tactic troubles the Court. It renders the determination of the circumstances surrounding the death of Mr. Baez more difficult.

Nevertheless, based on the evidence presented it is clear to this Court that Anthony Baez, an otherwise decent, hard-working, young man and his three brothers were playing football in the street in front of their home at the unusual hour of about 1:30 in the morning.

One police officer, the defendant, out of the four that were present, sparked by a football hitting his RMP, wanted them to stop the street game and go home, and here is where the recipe for tragedy was born.

Police Officer Livoti failed to properly address this situation and the brothers did not know how to respond.

From this conflict flowed a tragic devastating result. The most troubling aspect of this scenario is the fact that it was easily avoidable, the most unsettling aspect is that neither side saw to prevent or ease the boiling confrontation that was about to materialize in this minor incident.

The defendant Livoti claims that his conduct was authorized by law and the physical force he used was in

response to the deceased's unlawful use of physical force to resist a lawful arrest.

Indeed Penal Law section 35.27 reads as follows:

A person may not use physical force to resist an arrest, whether authorized or unauthorized, which is being affected or attempted by a police officer when it would reasonably appear that the latter is a police officer.

However, the issue is how much and what kind of force when used by a police officer rises to the level of criminally negligent homicide.

Anthony Baez was arrested by uniformed police officers and he engaged in a serious struggle to avoid being handcuffed.

It is also clear from the credible eyewitnesses which is supported by the corroborating credible medical evidence that the defendant during this struggle placed his arm around the deceased's neck and chest to subdue him.

During the struggle, Officer Livoti now joined by Sergeant Monohan and Mr. Baez., all fell to the ground face-down.

The defend ant along with other police officers applied significant pressure to Mr. Baez' back in an

attempt to secure his hands behind him, thus completing the handcuffing.

It is clear beyond a reasonable doubt that Anthony Baez died as a result of asphyxiation, complicated by chronic and acute asthma. That the pressure applied to his throat and the weight applied to his back compressing his chest during the handcuffing caused an acute asthma attack.

I note that Anthony Baez died with asthma and not because of asthma.

Based on the credible evidence, this Court concludes that it was this combination of events that caused Mr. Baez's breathing to cease and ultimately caused his death.

It is equally clear that the medical evidence established that less pressure is necessary to asphyxiate a person such as mr. Baez than a completely healthy individual because, one; he was exerting himself in cold, dry air which could exacerbate his asthma, three; he was obese, four; he was engaged in a highly stressful and violent struggle which also served to exacerbate his asthma and lastly, he was face-down when the pressure was applied to his back.

In reaching these conclusions, I have especially

noted and accepted the testimony of Dr. Hirsch, the Chief Medical Examiner of New York city whose expert opinion I find to be the most compelling out of all of the medical experts who testified in this case.

Dr. Hirsch testified that forceful compression of the neck lasting approximately one minute or more would be required to create the petechiae observed in the deceased's eyes.

Dr. Hirsch further explained that the petechiae thus created would not disappear upon release of the choke hold, if a person thereafter placed face-down on the ground and pressure applied to his back which prevents the chest from expanding, Dr. Hirsch noted that a person can asphyxiate because he is unable to draw air into his lungs.

Dr. Hirsch's expert opinion was that the injury that is caused by Mr. Baez' death was consistent with a choke hold being placed around the deceased's neck that rendered the deceased temporarily unconscious.

That the deceased could regain consciousness after the grip was released, he was of the further opinion that the deceased was thereafter capable of resisting and struggling to avoid being handcuffed. That the pressure applied to his back as he lay face-down on the ground could significantly impair his breathing which could further be impaired by an acute asthma attack.

All of which circumstances could combine to cause Mr. Baez' asphyxiation and death.

In this Court's struggle to reconcile the divergent testimony of the prosecution witnesses, the court carefully considered all of the testimony offered by all of the witnesses and the Court has come away with the conclusion that Dr. Hirsch's opinion is consistent with and supports, in important areas, important testimony of Sergeant Monohan and Police Officer Erotokritou, two of the police officers called by the prosecution in support of their case.

The facts of this case are remarkably similar in certain respects to those set forth in People v. Futterman located at 86 Appellate Division 2d. 70.

In Futterman, the defendant placed the deceased who was also a large strong man in a choke hold during a struggle.

Thereafter, with the assistance of four other individuals, the defendant placed the deceased face-down, the choke hold was maintained around the deceased's neck until he stopped struggling.

The deceased was thereafter noted to be breathing heavy, not moving and the defendant and the four others involved in the struggle realized that the defendant had

stopped breathing, CPR and other life-support techniques were utilized but the deceased did not respond.

The defendant was convicted by a jury of criminally negligent homicide but notably on appeal, the defendant's conviction was reversed.

The court concluded that the deceased died from asphyxiation as a result, from a choke hold that was applied by the defendant.

However, the court found that the conduct occurred within an quote emergency situation fraught with danger in which the defendant was required to quickly to assess the situation and pursue a course of action which he deemed advisable.

Since there was no time for weighing the alternatives he cannot reasonably be held to the same standard as one who has had a full opportunity to reflect, end quote.

The Court in Futterman, an Appellate Division case as noted, set forth the concept that criminal negligence and the statute which defines criminal negligence has been a constant source of confusion.

I note that the Futterman case was decided in 1982. Futterman says that criminal negligence is a constant

source of confusion and vexation for the courts and for legislature due to its apparent internal inconsistencies.

Criminally negligent homicide requires a culpable mental state of unawareness, a failure to perceive a risk as opposed to a criminal state of mind that is usually required, an intentional or a knowing state of mind that is an act that is consciously and intentionally and deliberately performed.

As noted by the Court in Futterman and I again quote this case, instead of evaluating conduct which is easily recognizable and condemned as morally reprehensible we are forced to scrutinize conduct which consists essentially of an error in judgement, end quote.

New York Court of Appeals noted in the Boudin case that the prosecution must prove that there existed a substantial and unjustifiable risk of death as a result of serious blameworthy conduct, the nonperception of a risk, even if death results, is not enough to sustain a conviction for criminally negligent homicide.

Compare if you will the case of People vs. Simon, another Appellate Division case.

In that case the female victim was thin and frail and suffered from a chronic respiratory condition which resulted in an unhealed tracheotomy wound.

The defendant places the deceased in a choke hold and proceeded to tie her feet to a bed. And despite the dire straits of the deceased, and her please for help, the defendant left her completely restrained in and seclusion for over one hour.

The victim died despite attempts at resuscitation. Autopsy revealed bruising on her neck muscles and hemorrhaging on both sides of the larynx.

She also suffered a lacerated liver due to the defendant's knee being placed upon her back during the restraint.

The defendant's conviction for criminally negligent homicide and other crimes was affirmed by the Appellate Court about in a 3 to 2 decision.

The majority noted that the defendant knew of the deceased's medical history and knew of her impaired breathing condition yet ignored her pleas for medical attention.

Unlike the quickly unfolding violent and emergency situation in the Futterman case and also the facts in this case, the events occurred over a lengthy period of time which provided the defendant with the opportunity to reflect on his course of action.

The majority concluded that the hemorrhaging of her neck was the result of the defendant's squeezing her neck and the liver laceration was the result and was consistent with the defendant's kneeling on that part of the deceased's frail body.

To further illustrate these principles of law that are soft and create vexing concepts so that they be more readily understood, I presided over a case entitled People vs. Socia wherein the defendant was a police officer charged with criminally negligent homicide.

In this nonjury case the evidence clearly demonstrated that the defendant pointed a loaded 357 magnum at the head of
his best friend and pulled the trigger in a playful gesture.

The defendant was not aware that the gun was loaded but he took no precautions to ensure that the gun was unloaded. His best friend was shot to death.

I found him guilty of criminally negligent homicide and that judgment remains undisturbed.

In the instant case, the rapid, dynamics, violent, emergency situation that unfolded when Officer Livoti attempted to place Anthony Baez under arrest, there was little time for reflection or consideration of whether his actions of putting his arm across Mr. Baez' chest and throat

during a furious struggle, resulting in Mr. Baez being face-down on the ground and applying pressure to his back would cause him to cease breathing.

Further, the surrounding circumstances do not suggest that Officer Livoti or any other officer should have suspected that Mr. Baez suffered from asthma which would intensify the potential consequences of their actions.

In fact the situation presented to the officers on the scene suggested otherwise. The deceased, Mr. Baez, was a strong young man who was 5 foot 8 inches, weighed 269 pounds.

He had been observed playing football for at least a half hour. He became extremely agitated upon the arrest of his younger brother and he did engage in a serious struggle with a number of police officers to avoid being handcuffed upon his own arrest.

The burden of proof requires clear evidence of blameworthy conduct which goes beyond that which was demonstrated in this case.

As noted in Boudin, nonperception of a risk even if death results, is not enough. The defendant is not on trial for being a bad cop, he sits here as a criminal defendant with all the protections given to a criminal defendant under the law.

Despite the passions that have been raised by this case, despite the great sympathy that this Court has for the Baez family, the People are required to prove the guilt of this defendant beyond a reasonable doubt which is the highest standard of proof known to the law.

The fact finder must be certain and unwavering in its judgment. It cannot look attractive at one moment and then uncertain the next.

This Court is bound to put aside its own passion, as difficult as that may be, and must render a verdict consistent with the requirements of the law.

I do not find that the defendant is innocent. I do find based on the quality of the evidence presented, that the People have failed to establish the defendant's guilt beyond a reasonable doubt.

The defendant is found not guilty.

* * * * *

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPTION OF THE STENOGRAPHIC NOTES.

S/ Elizabeth A. Demasi
ELIZABETH A. DEMASI

Official Court Reporter

Supreme Court, U.S.
FILED
APR 07 2000
CLERK

(2)

No. 99-1344

In the Supreme Court of the United States

FRANCIS X. LIVOTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

BILL LANN LEE
Acting Assistant Attorney General

DENNIS J. DIMSEY
KEVIN K. RUSSELL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

16pp

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in granting an upward departure on the ground that petitioner's offense conduct was atypical, taking it out of the heartland of similar offenses.

2. Whether the civil rights Sentencing Guideline's six-level enhancement for acts committed by public officials or under color of law, Sentencing Guidelines § 2H1.1(b)(1), applies where the jury found beyond a reasonable doubt as an element of the offense that petitioner acted under color of law.

3. Whether the district court erred in applying the obstruction of justice enhancement, Sentencing Guidelines § 3C1.1, because during the prosecution of the instant offense, petitioner committed perjury before the grand jury in state proceedings and petitioner called witnesses to offer perjured testimony on his behalf in the federal proceedings.

4. Whether the district court correctly applied the involuntary manslaughter Guideline, Sentencing Guidelines § 2A1.4, after finding that petitioner recklessly caused his victim's death.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Braxton v. *United States*, 500 U.S. 344 (1991)	8
Koon v. *United States*, 518 U.S. 81 (1996)	8, 9, 10, 12, 13
United States v. *Langer*, 958 F.2d 522 (2d Cir. 1992)	10
United States v. *McDermott*, 918 F.2d 319 (2d Cir. 1990), cert. denied, 500 U.S. 904 (1991)	10

Statutes and rules:

18 U.S.C. 241 (1994 & Supp. IV 1998)	12
18 U.S.C. 242	2, 3, 4, 11, 12
18 U.S.C. 3553(b)	5
United States Sentencing Guidelines:	
§ 2A1.4	13
§ 2A1.4(a)(2)	3
§ 2A2.2	13
§ 2H1.1	4, 12
§ 2H1.1(a)	3, 11
§ 2H1.1(b)(1)	3, 7, 11
§ 3C1.1	4, 12
§ 4A1.3	6
§ 5K2.0	5, 7-8
Ch. 1, Pt. A(4)(b)	8

In the Supreme Court of the United States

No. 99-1344

FRANCIS X. LIVOTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 196 F.3d 322. The opinion of the district court (Pet. App. C1-C37) is reported at 22 F. Supp. 2d 235.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1999. The petition for a writ of certiorari was filed on February 3, 2000. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was

convicted of depriving a citizen of constitutional rights under color of law, in violation of 18 U.S.C. 242. He was sentenced by the district court to 90 months' imprisonment to be followed by three years' supervised release. The court of appeals affirmed.

1. In the early hours of December 22, 1994, petitioner was on duty in the South Bronx as an officer with the New York City Police Department (NYPD). Pet. App. A2. Petitioner stopped to speak with other officers in a different patrol car near the home of the Baez family. *Id.* at A2, C4. While petitioner and his colleagues were speaking, Anthony Baez and his three brothers were playing football in the street. Two errant passes struck the officers' vehicles, angering petitioner, who cursed the brothers and ordered them to leave the area, go to a park, or go home. *Id.* at A2, C5. The brothers continued to play football, but in the opposite direction in order to avoid hitting the officers' vehicles. *Ibid.* Petitioner then exited his vehicle, cursed the brothers, and challenged them to a fight. *Id.* at A2-A3, C6. David Baez announced that he would not go home. Petitioner placed David in handcuffs and put him in the back of his patrol car. *Id.* at A3, C6. After Anthony protested David's arrest, petitioner attempted to arrest Anthony, but Anthony refused to put his arms behind his back to be handcuffed and, instead, held his arms to his chest. *Id.* at A3, C7.

In response, petitioner placed Anthony in a "choke hold," a method of restraint that was forbidden by NYPD training and policy, in which an individual's neck is clamped between the officer's forearm and bicep, cutting off the individual's airway and blood circulation to the brain. Pet. App. A3-A4, C10. Anthony's father and another brother pleaded with petitioner to stop choking Anthony, informing petitioner that Anthony

had asthma; but petitioner continued the choke hold even though Anthony at no point resisted him. *Id.* at A3, C7. After choking Anthony for at least one minute, petitioner lowered his limp body to the ground, where Anthony remained motionless while officers handcuffed him and carried him to a patrol car. *Id.* at A3, C8. Anthony was transported to the hospital where he was pronounced dead. *Id.* at A3, C9.

2. Petitioner was indicted by a state grand jury and tried for criminally negligent homicide. Pet. App. F2. He was acquitted in a state court bench trial. *Id.* at F15.

3. Petitioner was then tried in federal court where a jury found him guilty of depriving Anthony Baez of his civil rights, in violation of 18 U.S.C. 242. Pet. App. C2. The district court sentenced petitioner to 90 months' imprisonment to be followed by three years' supervised release.

a. The court applied the Guideline for "Offenses Involving Individual Rights," which incorporates in the circumstances present here the base offense level applicable to the underlying conduct. Sentencing Guidelines § 2H1.1(a). The court found that petitioner's underlying conduct was reckless and constituted involuntary manslaughter, requiring a base offense level of 14, under Sentencing Guidelines § 2A1.4(a)(2). Pet. App. C14-C25. The court based its determination on a finding that the evidence established that the primary cause of Baez' death was petitioner's proscribed choke hold, and not, as petitioner argued, an asthma attack or Baez' weight. *Id.* at C9-C14. Thus petitioner recklessly caused Baez' death. *Id.* at C19-C25.

b. The court then added six levels as required by Sentencing Guidelines § 2H1.1(b)(1) because petitioner acted under color of law and as a public official. Pet.

App. C25-C27. The district court rejected petitioner's argument that because 18 U.S.C. 242 requires as an element of the offense that the defendant acted under color of law, to apply the enhancement would result in impermissible double counting. Pet. App. C26. The court explained that Guideline § 2H1.1

> applies to all civil rights violations, whether or not they are committed by public officials or under color of law. * * * Thus, the 'under color of law' element is not a component of the base offense level under § 2H1.1. As a result, application of the six-level enhancement under [§] 2H1.1 does not constitute impermissible double counting.

Pet. App. C26. In any event, the court found that petitioner was also a public official, which is not an element of the offense of conviction, and that finding provided an alternative basis for the enhancement. *Id.* at C27 n.10. The enhancement resulted in an offense level of 20.

c. The court next applied the two-level upward adjustment for obstruction of justice pursuant to Sentencing Guidelines § 3C1.1. Pet. App. C27-C37. That Guideline applies if the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." Sentencing Guidelines § 3C1.1. Application Note 3 of that Guideline sets forth a non-exhaustive list of examples of obstruction that includes committing, suborning, or attempting to suborn perjury.

The district court found by clear and convincing evidence that petitioner had committed perjury before the grand jury in the state proceedings. Pet. App. C28-C29 & n.11. The court concluded that this perjury could

be considered part of the "instant offense" because petitioner's testimony before the state grand jury was "tied to" the offense of conviction, as that testimony ultimately obstructed and impeded the federal investigation. *Id.* at C30-C33 (citing cases from the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits).

The district court found that petitioner also obstructed justice by knowingly presenting the perjured testimony of fellow officers at his federal trial. Pet. App. C33-C37. The obstruction of justice adjustment resulted in an offense level of 22.

d. The district court denied petitioner's motion for a downward departure. Pet. App. C37, E9, E41. Petitioner sought a downward departure on three grounds: the victim's conduct, the fact that petitioner endured successive and burdensome state and federal prosecutions, and the potential for prison abuse. The court rejected the first ground as a basis for departure, finding it "particularly inapplicable" here where "the victim committed no criminal act and never threatened the defendant." *Id.* at E41. Exercising its discretion, the district court declined to depart downward for the other two reasons but stated that "both of those arguments will be taken into account in fashioning the appropriate sentence." *Ibid.*

e. The court granted the government's motion for an upward departure because the extraordinary circumstances of the case took it outside the heartland of typical cases contemplated by the Guidelines. See Sentencing Guidelines § 5K2.0 (permitting departures when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission * * * that should result in a sentence different from that described"); 18 U.S.C. 3553(b). See also Pet. App.

E10, E43. The court concluded that a four-level upward departure was warranted because petitioner had no probable cause to arrest the Baez brothers; petitioner acted without any real provocation; and petitioner deliberately disregarded repeated specific and personal admonitions from the NYPD regarding (a) petitioner's prior use of excessive force and unnecessary confrontations with civilians, and (b) the dangers of the forbidden choke-hold restraint. Pet. App. E43-E45. See also *id.* at A11-A12, A15-A17. The court limited the upward departure to four levels because Baez resisted petitioner's attempt to handcuff him, and because of petitioner's long service in the NYPD, his prior unsuccessful prosecution in state court, his risk of abuse in prison as a former police officer, and the NYPD's failure to remove him from the force earlier in light of his repeated incidents of excessive force. *Id.* at E45-E48.

f. The court granted the government's motion for an increase in petitioner's criminal history category because reliable information indicated that petitioner's criminal history category did not adequately reflect the seriousness of his past criminal conduct pursuant to Sentencing Guidelines § 4A1.3. Pet. App. E9-E10, E41-E43. Petitioner's criminal history category would have been II on the basis of his prior conviction for assault and reckless endangerment of a civilian in the course of arrest. *Id.* at E9. The district court increased his criminal history category to III because it found that petitioner had engaged in prior similar criminal conduct that did not result in conviction, namely assaulting two men in the course of another arrest. *Id.* at E41-E42.

An offense level of 26 combined with petitioner's adjusted criminal history category of III called for a sentence of 78 to 97 months' imprisonment under the

Guidelines. The court imposed a sentence of 90 months' imprisonment, declining to sentence at the top of the range after taking into account the statements of petitioner and his counsel at sentencing. Pet. App. E48-E49.

4. On appeal, petitioner unsuccessfully challenged many aspects of his trial and sentence. Pet. App. A1-A18. The court of appeals rejected petitioner's argument that the district court erred when it applied the involuntary manslaughter Guideline because the district court's finding that petitioner caused Baez' death was not clearly erroneous. *Id.* at A10. The court of appeals did not reach petitioner's claim that it was improper to apply the six-level "under color of law" enhancement of Sentencing Guidelines § 2H1.1(b)(1), in cases where acting under color of law is an element of the statutory violation, because it concluded that the enhancement would have been required on the independent ground that petitioner was a "public official" at the time of his acts. Pet. App. A11. The court of appeals did not reach petitioner's claim that the two-level adjustment for obstruction of justice was not available for petitioner's obstruction of the state investigation, because the court concluded that the adjustment was triggered by petitioner's conduct during the federal trial, in which he called fellow officers to testify knowing that they would perjure themselves. *Id.* at A10.

The court of appeals rejected petitioner's argument that the district court abused its discretion in increasing his criminal history category. Pet. App. A11-A12. Finally, the court of appeals concluded that the district court acted within its discretion in determining that this case was sufficiently atypical to warrant an upward departure under Sentencing Guidelines

§ 5K2.0, expressly approving the three grounds on which the district court relied and concluding that the degree of departure was reasonable. Pet. App. A12-A17.

ARGUMENT

Petitioner raises fact-specific claims of error in the district court's application of the Sentencing Guidelines to his case. Petitioner does not contend that the court of appeals' decision conflicts with the decisions of this Court or any court of appeals. To the extent any general issues of interpretation or application of the Sentencing Guidelines are implicated, those issues are best addressed by the Sentencing Commission rather than this Court. See *Braxton* v. *United States*, 500 U.S. 344 (1991). Accordingly, petitioner's claims are without merit and do not warrant review.

1. Petitioner first contends (Pet. 9-19) that the district court erred in finding this case atypical and imposing a four-level upward departure from his offense level. Petitioner's objections to the district court's decision to grant an upward departure on the particular facts of this case were properly resolved by the court of appeals and present no legal question warranting review by this Court. See *Koon* v. *United States*, 518 U.S. 81, 99 (1996) ("[A] district court's departure decision involves the consideration of unique factors that are little susceptible . . . of useful generalization.") (internal quotation marks omitted).

A departure from the sentencing range is permitted when the facts of a particular case take it outside the "heartland of typical cases" contemplated by the relevant Guideline. *Koon*, 518 U.S. at 94; Sentencing Guidelines Ch. 1 Pt. A(4)(b). Because district courts have an institutional advantage in the fact-specific task

of distinguishing typical from atypical cases, this Court has held that "[a] district court's decision to depart from the Guidelines * * * will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." *Koon*, 518 U.S. at 98. See also *id.* at 100.

In this case, the court of appeals properly declined to second-guess the district court's finding that the degree of petitioner's recklessness in causing the death of an innocent civilian made this case atypical of other cases of involuntary manslaughter under color of law. Pet. App. A14-A17. Petitioner attempts to portray the district court as having made the legal error of considering whether this case was atypical of civil rights cases *generally* as opposed to cases of involuntary manslaughter under color of law, by quoting one statement in the sentencing transcript out of context. See Pet. 9. The court of appeals, however, properly understood the district court to have concluded that petitioner's case was atypical of police excessive force cases resulting in death.[1] Pet. App. A14-A17, E43-E45.

In particular, the district court concluded that, compared to typical excessive force cases, the level of petitioner's culpability in creating and escalating the confrontation that led to the use of force was atypical. The district court noted that this was not a case in

---

[1] The district court did not, as petitioner asserts (Pet. 18-19), base its upward departure on the mere fact that the excessive force resulted in death. The statement that petitioner cites was made in the context of describing why the court chose a four-level upward departure rather than a larger or smaller departure. Pet. App. E47-E48. The court simply observed that because this case resulted in death, it was more serious than the beating case in *Koon* and, therefore, "[s]uch a crime warrants a significant sentence." *Id.* at E48.

which a lawful arrest was followed by illegal resistance that led to a lawful use of force that subsequently became excessive. Pet. App. E43.[2] In this case, petitioner's misconduct was responsible for each step of the escalation, from the illegal arrest of David Baez, to the illegal arrest of Anthony Baez, to petitioner's exaggerated response to the perceived affront to his authority that led to Anthony's death. *Id.* at E43-E44. Petitioner's case was also atypical in the unusual degree to which he had been personally warned by the NYPD about his prior violent confrontations with civilians.[3] *Id.* at E44-E45.

---

[2] Petitioner argues (Pet. 12) that lack of probable cause is not a basis for departure because it is within the heartland of the civil rights and involuntary manslaughter Guidelines, citing *United States* v. *McDermott*, 918 F.2d 319 (2d Cir. 1990), cert. denied, 500 U.S. 904 (1991), and *United States* v. *Langer*, 958 F.2d 522 (2d Cir. 1992). Those cases merely stand for the proposition that arrest or detention without probable cause can constitute a violation of criminal civil rights laws. In neither of those cases, which concerned convictions, not sentencing, did the Second Circuit hold that a lack of probable cause is within the heartland of civil rights offenses or that a lack of probable cause could never be a basis for upward departure. Petitioner also provides no support for his contention (Pet. 11-13) that a lack of probable cause and a lack of victim provocation are identical or fall within the heartland of an involuntary manslaughter offense as a matter of law. In this case, the district court explained why both these factors made petitioner's offense atypical. Pet. App. E43-E44.

[3] Contrary to petitioner's contention (Pet. 15-18), there was no double counting of petitioner's awareness of the NYPD's policy on choke holds in calculating the offense level and determining the upward departure. As the court of appeals explained, the district court relied on the fact that petitioner had deliberately disregarded personalized warnings about his violent behavior, along with the clear NYPD policy on choke holds, as a basis for upward departure. Pet. App. A16-A17, E44-E45; *Koon*, 518 U.S. at 94

2. Petitioner next argues (Pet. 19-21) that the district court erred in applying the specific offense characteristic subsection of the civil rights Guideline, which states that "[i]f (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by 6 levels." Sentencing Guidelines § 2H1.1(b)(1). He claims that applying the provision constituted impermissible "double counting" because punishment for acting under color of law "is already built into the base level of the civil rights sentencing guideline" when the underlying offense requires proof that petitioner acted under color of law. Pet. 20.

The court of appeals did not address this argument because it concluded that petitioner also qualified for the enhancement as a "public official," which is not an element of a Section 242 offense. See Pet. App. A11. Thus, even under petitioner's reasoning, a six-level enhancement for acting as a public official would not constitute impermissible double counting. Petitioner does not dispute the court of appeals' factual or legal conclusion on this point.

In any event, as the district court explained, Pet. App. C26-C27, petitioner is wrong in his assertion that punishment for the "color of law" characteristic of his crime is already "built into" the base offense level dictated by the first subsection of the civil rights Guideline, Sentencing Guidelines § 2H1.1(a). The fact that color of law is an element of the offense of conviction does not mean that that factor is incorporated into the base offense level in the Guidelines; the structure of the

---

(district court may depart based on aggravating circumstances "of a kind *or degree* not adequately taken into consideration by the Commission") (emphasis added).

civil rights Guideline itself leads to the opposite conclusion. Many offenders sentenced under the civil rights Guideline have not acted under color of law or as public officials.[4] For that reason, the first subsection of the guideline creates a base level of punishment applicable to all civil rights violations; the specific offense characteristics subsection then enhances that level by six to provide additional punishment when those violations occurred through an abuse of official authority. See *Koon*, 518 U.S. at 101-102 (discussing application of six-level enhancement to a Section 242 case under predecessor civil rights Guideline). Therefore, the double counting cases petitioner cites (Pet. 21) are simply inapposite.

3. The court of appeals likewise did not address petitioner's contention (Pet. 21-24) that the district court erred in finding an obstruction of justice in the "instant offense," Sentencing Guidelines § 3C1.1, for conduct that occurred during the state investigation of his crime, prior to commencement of any federal inquiry. The court of appeals did not reach this issue because it relied on the district court's alternative ground for the enhancement, that petitioner knowingly presented perjured testimony from witnesses during his federal trial, a ground not challenged by petitioner. See Pet. App. A10-A11, C33-C37. Thus, the proper interpretation and scope of the obstruction provision is not presented in this case.

---

[4] For example, the Guideline applies to violations of 18 U.S.C. 241 (1994 & Supp. IV 1998), which covers private conspiracies against civil rights and does not require that the acts be committed by public officials or under color of law. See Sentencing Guidelines § 2H1.1 Statutory Provisions.

4. Petitioner's final claim (Pet. 24-29) is that the district court should not have applied the involuntary manslaughter Guideline to his case because he did not cause Baez' death. The district court found otherwise, and the court of appeals correctly concluded that the district court's finding was not clearly erroneous.[5] This factual dispute presents no question warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

BILL LANN LEE
Acting Assistant Attorney General

DENNIS J. DIMSEY
KEVIN K. RUSSELL
Attorneys

APRIL 2000

---

[5] Moreover, if the district court had concluded petitioner's choke hold was not the primary cause of Baez' death, the appropriate Guideline would likely have been that for aggravated assault, which would have led to a higher base offense level than petitioner received under the involuntary manslaughter Guideline. Compare Sentencing Guidelines § 2A2.2 (aggravated assault Guideline providing for a base offense level of 15, with enhancements of up to six levels depending on the extent of the victim's injuries) with Sentencing Guidelines § 2A1.4 (involuntary manslaughter Guideline providing for a base offense level of 14 if the conduct was reckless). See also *Koon*, 518 U.S. at 101 (applying aggravated assault Guideline in police excessive force case).